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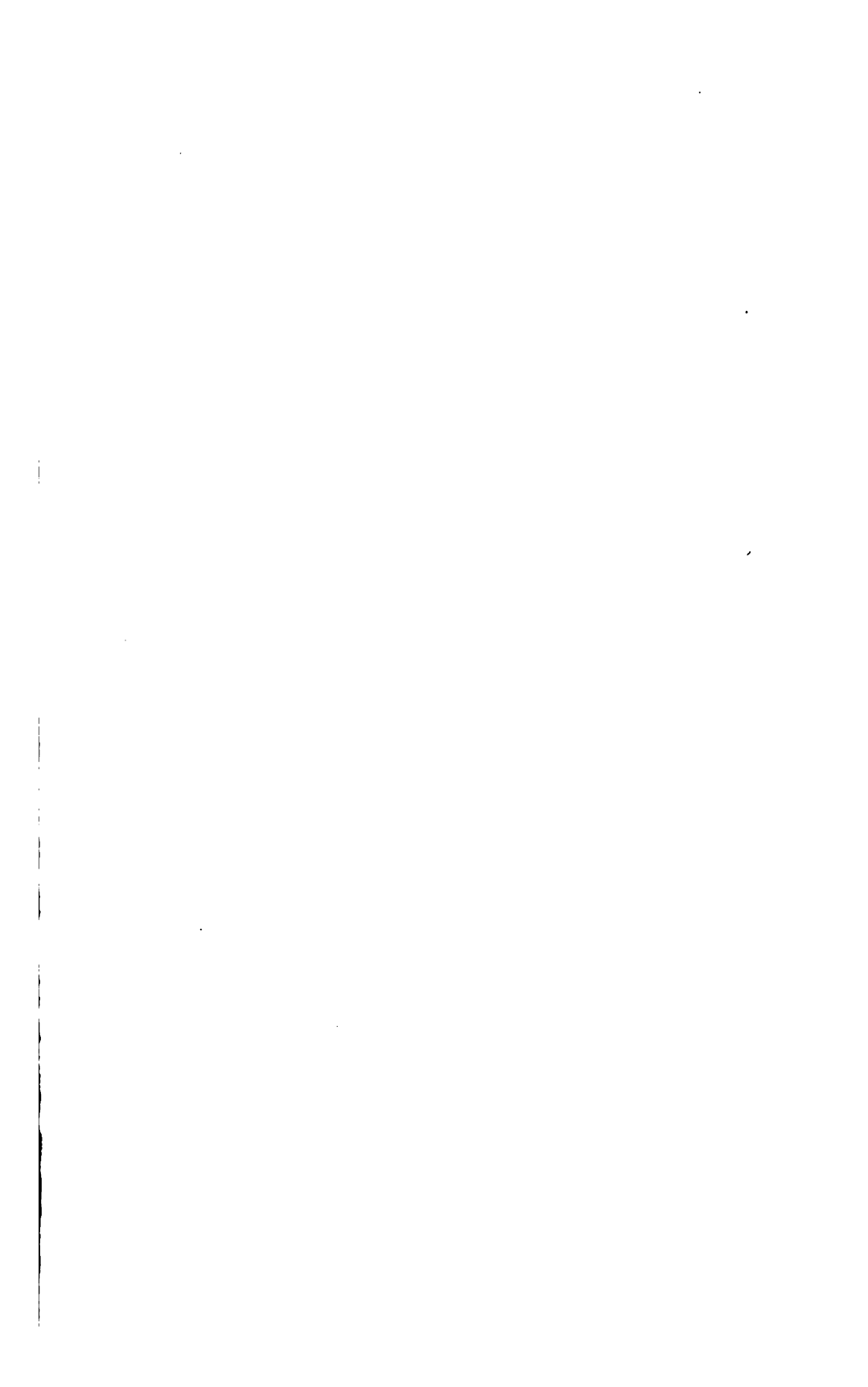


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**REPORTS**

**OF**

**CASES ARGUED AND DETERMINED**

**IN THE**

**SUPREME COURT**

**OF THE**

**STATE OF MONTANA**

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**FROM FEBRUARY 10, 1913, TO JUNE 28, 1913**

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**OFFICIAL REPORT**

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**VOLUME 47**

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**BANCROFT-WHITNEY COMPANY**  
**1913**

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**JUSTICES**  
**OF**  
**THE SUPREME COURT OF THE STATE OF MONTANA,**  
**DURING THE TIME OF THESE REPORTS.**

---

**THE HON. THEO. BRANTLY, Chief Justice.**  
**THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.**  
**THE HON. SYDNEY SANNER, }**

---

**OFFICERS OF THE COURT:**

**D. M. KELLY, Attorney General.**

**W. H. POORMAN, Asst. Attorney General.**

**<sup>1</sup>J. H. ALVORD, Asst. Attorney General.**

**<sup>2</sup>CHAS. S. WAGNER, Asst. Attorney General.**

**JOHN T. ATHEY, Clerk.**

**MARSHALL N. RACE, Marshal.**

**AUGUST C. SCHNEIDER, Court Stenographer.**

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<sup>1</sup> Appointed April 1, 1913, to succeed Simon P. Wilson, resigned.

<sup>2</sup> Appointed May 12, 1913, to succeed Louis P. Donovan, resigned.





## **ATTORNEYS AND COUNSELORS AT LAW.**

Admitted from March 10, 1913, to October 27, 1913.

ADAMS, CHARLES G., October 20, 1913.  
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BARNCORD, NORMAN R., October 17, 1913.  
BEADLE, M. KERR, July 10, 1913.  
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BLAISDELL, ALFRED, September 15, 1913.  
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BUNSTON, H. W., October 10, 1913.  
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COLES, THOMAS MCADAMS, September 15, 1913.  
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EASTON, DANA M., May 19, 1913.  
ELLERY, CLINE R., September 15, 1913.  
ELWELL, CHAS. B., May 12, 1913.  
ENTERLINE, E. E., October 15, 1913.  
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ESBERG, SOLOMON, September 26, 1913.  
FARRINGTON, R. M., October 27, 1913.  
FITZPATRICK, EDWARD, July 19, 1913.  
FLASTED, MARTIN W., September 29, 1913.  
FLUENT, FLOYD C., September 22, 1913.  
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GREENE, JOHN J., March 10, 1913.  
GRORUD, ALBERT A., September 26, 1913.  
GUINN, C. C., September 22, 1913.  
HANSON, GEORGE C., September 20, 1913.  
HARDEN, EMERY D., September 22, 1913.  
HEIMLICH, PHILLIP A., April 14, 1913.  
HENDERSON, JESSE G., September 15, 1913.

HIGLEY, L. W., September 22, 1913.  
HOBLITT, A. B., July 11, 1913.  
HOLT, CLIFFORD F., April 7, 1913.  
HOOVER, HOMER A., June 2, 1913.  
HUGHES, ALVIN L., June 2, 1913.  
JORDAN, LORING W., May 5, 1913.  
KARTACK, IRWIN C., September 22, 1913.  
KUHR, WILLIAM H., July 7, 1913.  
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MC CARTHY, VERE L., September 15, 1913.  
MCDONALD, JAMES J., September 26, 1913.  
MCLAUGHLIN, D. E., May 5, 1913.  
MCLEMORE, CLYDE, March 31, 1913.  
MOREHART, GROVER C., August 6, 1913.  
PLANTE, JOSEPH O., September 15, 1913.  
RATHBONE, COKER T., September 29, 1913.  
SCHOENING, HARRY A., October 27, 1913.  
SCOTT, GUY L., September 15, 1913.  
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SWAN, JESSE R., September 22, 1913.  
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VOLLUM, ALFRED T., September 20, 1913.  
WALDO, WILLIAM B., March 27, 1913.  
WILLIAMS, J. A., September 22, 1913.  
YACK, REINHOLD H., October 27, 1913.

**DIRECTORY**  
**OF THE**  
**JUDICIAL DISTRICTS OF THE STATE OF MONTANA.**  
1913.

---

**FIRST JUDICIAL DISTRICT.**

County of Lewis and Clark. County Seat, Helena.  
District Judges: Hon. James M. Clements; Hon. J. Miller Smith.  
Officers: County Attorney, Andrew H. McConnell, Esq.  
Clerk of District Court, F. L. Reece.  
Sheriff, Rolla Duncan.

---

**SECOND JUDICIAL DISTRICT.**

County of Silver Bow. County Seat, Butte.  
District Judges: Hon. Michael Donlan; Hon. J. J. Lynch; Hon.  
J. B. McClernan.  
Officers: County Attorney, Joseph J. McCaffery, Esq.  
Clerk of District Court, John J. Foley.  
Sheriff, Timothy Driscoll.

---

**THIRD JUDICIAL DISTRICT.**

Counties of Deer Lodge, Powell and Granite.  
District Judge: Hon. George B. Winston.  
Officers of Deer Lodge County (County Seat, Anaconda):  
County Attorney, Thomas P. Stewart, Esq.  
Clerk of District Court, M. L. McDermott.  
Sheriff, Myles Kelly.  
Officers of Powell County (County Seat, Deer Lodge):  
County Attorney, T. F. Shea.

Clerk of District Court, Robert Midtlyng.  
Sheriff, Jos. E. Neville.

**Officers of Granite County (County Seat, Philipsburg) :**  
County Attorney, David M. Durfee, Esq.  
Clerk of District Court, Wm. B. Calhoun.  
Sheriff, Daniel A. McLeod.

---

#### FOURTH JUDICIAL DISTRICT.

**Counties of Missoula, Ravalli and Sanders.**

**District Judges :** Hon. A. L. Duncan; Hon. R. Lee McCullough;  
Hon. John E. Patterson.

**Officers of Missoula County (County Seat, Missoula) :**  
County Attorney, Dan. J. Heyfron.  
Clerk of District Court, Thos. P. Conlon.  
Sheriff, W. L. Kelley.

**Officers of Ravalli County (County Seat, Hamilton) :**  
County Attorney, Jas. D. Taylor, Esq.  
Clerk of District Court, J. T. Coughenour.  
Sheriff, George See.

**Officers of Sanders County (County Seat, Thompson Falls) :**  
County Attorney, Gerald Young, Esq.  
Clerk of District Court, Wm. Strom.  
Sheriff, Wm. Moser.

---

#### FIFTH JUDICIAL DISTRICT.

**Counties of Beaverhead, Jefferson and Madison.**

**District Judges :** Hon. Joseph B. Poindexter; Hon. W. A. Clark.

**Officers of Beaverhead County (County Seat, Dillon) :**  
County Attorney, Roy S. Stephenson, Esq.  
Clerk of District Court, Chas. W. Conger.  
Sheriff, Daniel V. Erwin.

**Officers of Jefferson County (County Seat, Boulder):**

County Attorney, J. E. Kelly.

Clerk of District Court, W. B. Hundley.

Sheriff, P. J. Manning.

**Officers of Madison County (County Seat, Virginia City):**

County Attorney, Geo. R. Allen, Esq.

Clerk of District Court, Matt Carey.

Sheriff, Elijah Adams.

---

SIXTH JUDICIAL DISTRICT.

**Counties of Park, Stillwater and Sweet Grass.**

District Judge: Hon. Albert P. Stark.

**Officers of Park County (County Seat, Livingston):**

County Attorney, Vard Smith, Esq.

Clerk of District Court, Wm. Pethybridge.

Sheriff, John Killorn.

**Officers of Stillwater County (County Seat, Columbus):**

County Attorney, B. E. Berg, Esq.

Clerk of District Court, Guston Iverson.

Sheriff, Robert Guthrie.

**Officers of Sweet Grass County (County Seat, Big Timber):**

County Attorney, R. S. Steiner, Esq.

Clerk of District Court, H. C. Pound.

Sheriff, O. A. Fallang.

---

SEVENTH JUDICIAL DISTRICT.

**Counties of Custer and Dawson.**

District Judge: Hon. C. C. Hurley.

**Officers of Custer County (County Seat, Miles City):**

County Attorney, C. R. Tisor, Esq.

Clerk of District Court, Jas. G. Ramsay.

Sheriff, Hugh R. Wells.

**Officers of Dawson County (County Seat, Glendive):**

County Attorney, J. A. Slattery.

Clerk of District Court, H. A. Sample.

Sheriff, J. D. Wynn.

**JUDICIAL DISTRICTS OF THE**

**EIGHTH JUDICIAL DISTRICT.**

Counties of Cascade and Teton.

District Judges: Hon. Jere B. Leslie; Hon. Harry H. Ewing.

Officers of Cascade County (County Seat, Great Falls):

County Attorney, W. H. Meigs, Esq.

Clerk of District Court, Geo. Harper.

Sheriff, Louis H. Kommers.

Officers of Teton County (County Seat, Chouteau):

County Attorney, D. W. Doyle, Esq.

Clerk of District Court, James Gibson.

Sheriff, K. McKenzie.

**NINTH JUDICIAL DISTRICT.**

County of Gallatin. County Seat, Bozeman.

District Judge: Hon. Ben. B. Law.

Officers: County Attorney, Justin M. Smith, Esq.

Clerk of District Court, W. L. Hays.

Sheriff, W. S. Evans.

**TENTH JUDICIAL DISTRICT.**

County of Fergus. County Seat, Lewistown.

District Judge: Hon. Roy E. Ayres.

Officers: County Attorney, Charles J. Marshall, Esq.

Clerk of District Court, James L. Martin.

Sheriff, Firmin Tullock.

**ELEVENTH JUDICIAL DISTRICT.**

Counties of Flathead and Lincoln.

District Judge: Hon. John E. Erickson.

Officers of Flathead County (County Seat, Kalispell):

County Attorney, X. K. Stout, Esq.

Clerk of District Court, Sam. D. McNeely.

Sheriff, A. J. Ingraham.

**Officers of Lincoln County (County Seat, Libby):**  
County Attorney, Jas. M. Blackford, Esq.  
Clerk of District Court, Timothy Miller.  
Sheriff, Frank R. Baney.

---

**TWELFTH JUDICIAL DISTRICT.**

**Counties of Blaine, Chouteau, Hill, Sheridan and Valley.**  
**District Judges:** Hon. John W. Tattan; Hon. Frank N. Utter.  
**Officers of Blaine County (County Seat, Chinook):**  
County Attorney, D. L. Blackstone, Esq.  
Clerk of District Court, A. W. Ziebarth.  
Sheriff, Isaac Niebaur.  
**Officers of Chouteau County (County Seat, Fort Benton):**  
County Attorney, H. S. McGinley, Esq.  
Clerk of District Court, Geo. D. Patterson.  
Sheriff, I. M. Rogers.  
**Officers of Hill County (County Seat, Havre):**  
County Attorney, V. R. Griggs, Esq.  
Clerk of District Court, Geo. W. Glass.  
Sheriff, H. E. Loranger.  
**Officers of Sheridan County (County Seat, Plentywood):**  
County Attorney, Paul Babcock, Esq.  
Clerk of District Court, L. J. Onstad.  
Sheriff, Jack Bennett.  
**Officers of Valley County (County Seat, Glasgow):**  
County Attorney, John L. Slattery.  
Clerk of District Court, Walter Shanley.  
Sheriff, Patrick Nacey.

---

**THIRTEENTH JUDICIAL DISTRICT.**

**Counties of Carbon, Musselshell, Rosebud, Yellowstone, and Big Horn.**  
**District Judges:** Hon. Geo. W. Pierson; Hon. Chas. L. Crum.

**Officers of Carbon County (County Seat, Red Lodge) :**

County Attorney, F. P. Whicher.  
Clerk of District Court, H. A. Simmons.  
Sheriff, W. H. Gebo.

**Officers of Musselshell County (County Seat, Roundup) :**

County Attorney, G. J. Jeffries, Esq.  
Clerk of District Court, W. G. Jarrett.  
Sheriff, J. L. Fisco.

**Officers of Rosebud County (County Seat, Forsyth) :**

County Attorney, Henry V. Beeman, Esq.  
Clerk of District Court, D. J. Muri.  
Sheriff, Wm. Moses.

**Officers of Yellowstone County (County Seat, Billings) :**

County Attorney, Robt. C. Stong, Esq.  
Clerk of District Court, Lorin T. Jones.  
Sheriff, John C. Orrick.

**Officers of Big Horn County (County Seat, Hardin) :**

County Attorney, C. F. Gillette.  
Clerk of District Court, Frank A. Nolan.  
Sheriff, Dewey Riddle.

---

**FOURTEENTH JUDICIAL DISTRICT.**

**Counties of Meagher and Broadwater.**

**District Judge:** Hon. John E. Matthews.

**Officers of Meagher County (County Seat, White Sulphur Springs) :**

County Attorney, C. A. Linn, Esq.  
Clerk of District Court, F. H. Mayn.  
Sheriff, Robt. Menzies.

**Officers of Broadwater County (County Seat, Townsend) :**

County Attorney, Chas. P. Cotter, Esq.  
Clerk of District Court, Fred Bubser.  
Sheriff, Chas. B. Doggett.



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## **SUPREME COURT RULES.**

For Rules of the Supreme Court of the State of Montana, see  
44 Mont. xxv.

## **ERRATUM.**

Page 132, line 1 of paragraph 2 of syllabus, read: "Counties are political subdivisions," *etc.*, for "A county is a political subdivision," *etc.*

(xxvii)





CASES DETERMINED  
IN THE  
SUPREME COURT

AT THE  
DECEMBER TERM, 1912.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.  
THE HON. SYDNEY SANNER, }

MELVILLE ET AL., APPELLANTS, v. BUTTE-BALAKLAVA  
COPPER CO., RESPONDENT.

(No. 3,217.)

(Submitted January 14, 1913. Decided February 10, 1913.)

[130 Pac. 441.]

*Personal Injuries—Mines and Mining—Wrongful Death—Master and Servant—Right of Action—When Heirs cannot Recover—Statutory Construction—Eight-hour Law—Violation of Statutes—Negligence Per Se.*

**Personal Injuries—Master and Servant—Violation of Statute—Negligence Per Se—Defenses Available to Master.**

1. Where a statute, whether penal or not, makes a requirement or prohibits a thing for the benefit of a person or class of persons, a violation thereof constitutes negligence *per se*, and one injured by reason of its nonobservance is entitled to maintain an action against him by whose disobedience he has suffered harm; defendant in such an action, however, may defend on the grounds of contributory negligence, assumption of risk, etc., unless such defenses are expressly abrogated by the statute.

**Same—Servant in *Pari Delicto* With Master—Effect on Right of Recovery.**

2. Under the rule that an action does not lie at the suit of one who must base his claim, in whole or in part, on the violation of a criminal or penal law of the state, a miner who was killed while working in violation of sections 1739, 1740, Revised Codes, providing that eight hours shall constitute a day's work in mines under penalty of fine and

imprisonment in the county jail, could not, if he had survived his injuries, recover damages in an action brought for that purpose.

Same—Death of Servant—Right of Action—Statutory Construction.

3. Held, that section 6486, Revised Codes, in providing that when the death of a person is caused by the "wrongful act or neglect of another" his heirs or personal representatives may maintain an action for damages, etc., implies actionable wrong or negligence toward the decedent and not toward his surviving wife and children; *held*, further, that it did not create a cause of action in their favor, to which the defendant could not interpose the defenses of contributory negligence, assumption of risk, etc., but that their right to recover damages depended upon whether decedent, had he survived the injuries, could have done so.

*Appeal from District Court, Silver Bow County; Jno. B McClernan, Judge.*

ACTION by Thomas Melville and others against the Butte-Balaklava Copper Company. Judgment for defendant; plaintiffs appeal. Affirmed.

*Messrs. Maury, Templeman & Davies*, for Appellants, submitted a brief; *Mr. H. L. Maury* argued the cause orally.

*Messrs. Kremer, Sanders & Kremer*, for Respondent, submitted a brief; oral argument by *Mr. Louis P. Sanders*.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The purpose of this action is to recover damages for the death of Michael Melville, which is alleged to have been caused by the wrongful act of the defendant. The plaintiffs are the widow and minor children of the deceased, and sue as his heirs.

The facts showing how the accident occurred may be briefly stated as follows: On the evening of December 6, 1909, the deceased was in the employ of the defendant as shift boss and pumpman. He had gone on shift at about 7 o'clock in the morning, and had worked continuously from that time until he was injured. He and four other men constituted the shift. They were engaged in excavating a third compartment to the defendant's mining shaft. The work had begun at the 500-foot level, and had progressed upward to the 200-foot level. The two compartments already constructed were used, respectively,

for pumping and hoisting purposes. During the work the men stood upon a bulkhead, which extended over the three compartments of the shaft. Owing to the presence of the men there, the cage could not be lowered entirely to the level of the bulkhead. Therefore, in order to remove the debris resulting from the excavation, the men shoveled it into buckets, which were raised, one at a time, to the surface by means of a hook attached to the underside of the deck of the cage. When a bucket was ready to be raised, it was hooked to the cage; then, at a signal by the bell to the engineer at the surface, the cage was raised about five feet, or far enough to clear the bucket from the bulkhead. It was then stopped long enough to enable the men to steady the bucket, so that it would not swing back and forth and bump into the timbers on the way up. Upon the giving of a second signal, it was raised to the surface. When the change shift went on at 3 o'clock in the afternoon, it was found that the air-hose line had been broken by blasts set off by the morning shift. The air-line came down from the surface by way of the pump compartment, and through the other compartment into the excavation. The deceased, having charge of this shift also, undertook to repair the hose. The point at which the break in it had occurred was some fifteen feet above the level of the bulkhead. The deceased went up on the cage to this point, and stepped off upon the timbers separating the pump compartment from the hoist compartment. There being ample room for the cage to pass and repass him, he ordered the men below to send the cage up. Upon its return trip another bucket was attached to it, and the signal given to raise it. As usual, it was stopped for a moment to steady the bucket. By that time the deceased had completed the repairs, and, desiring for some reason to go to the surface, without giving notice to anyone of his intention to do so, he attempted to step upon the cage as it passed the position where he was standing. He missed his footing, was caught between the cage and the timbers, and so badly injured that he died within a few days thereafter.

The wrongful act for which recovery is sought is alleged in the complaint substantially as follows: That the deceased was working underground in defendant's mine in the capacity of shift boss and pumpman; that on December 6, 1909, the defendant wrongfully and intentionally required him to remain at work continuously for a period of more than eight hours; that after he had been engaged for more than eight hours he was "dealt by and in and from said required employment grievous bodily injuries, from which he died thereafter on the twelfth day of December, 1909"; and that there was not, at the time of the injury, any emergency by which life or property was in imminent danger. The answer denies generally the allegations of the complaint. It alleges that the injury of the deceased was due solely to his own negligence in attempting to step upon the cage while it was in motion, and that in so doing he assumed the risk, knowing the danger thereof. The reply joins issue upon these allegations.

It will be observed that the complaint does not allege that the deceased was in such a condition of mental and physical exhaustion, induced by overwork, that he was unable to give proper attention to his surroundings, and that this was the efficient cause of his injury. Though the evidence does not show definitely whether the deceased had continued work after the lapse of eight hours at the instance of defendant's superintendent, or whether he did it voluntarily to accommodate the shift boss who should have relieved him, it is conceded, for the purposes of this case, that he continued at work, with the knowledge of the superintendent, under a standing order made by him that each shift boss should continue at work until he was actually relieved by his successor. At the close of the evidence the court granted a nonsuit and rendered judgment for the defendant. The appeal is from the judgment. Did the court err in granting the nonsuit?

The plaintiffs are entitled to recover, if at all, under section 6486 of the Revised Codes, which declares: "When the death of a person not being a minor is caused by the wrongful act

or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person, who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

The theory of counsel for plaintiffs is that the provisions of the Codes which declare that "the husband must support himself and wife out of his property or by his labor," *etc.* (Rev. Codes, sec. 3692), and that "the parent entitled to the custody of a child must give him support and education suitable to his circumstances," *etc.* (*Id.*, sec. 3741), and similar provisions, confer vested rights upon the wife and children to support by the father; and that in every case where they have been deprived of this support by the death of the father, caused by the wrongful act or neglect of another, they have a cause of action against such other person, without regard to whether the father, if death had not ensued, could have maintained an action in his own behalf. It is argued, therefore, that, since the deceased was injured while at work at the request of the defendant, in violation of the provisions of sections 1739 and 1740 of the Revised Codes, though the death was caused wholly by the negligence of the deceased himself, the defendant is to be deemed guilty of his death by wrongful act, within the meaning of the statute.

Sections 3692 and 3741, *supra*, are not pertinent to the present inquiry. They may be dismissed from consideration, with the remark that, so far as they go, they declare the mutual obligations of the husband and wife with reference to the support of the family and the education of the children. They enjoin duties upon the living parents, and do not purport to confer vested rights upon the wife and children, within the meaning of the expression "vested rights" as it is ordinarily used.

Section 1739, *supra*, declares that eight hours shall constitute a day's work upon public works and in certain industries, in-

cluding operations in underground mines. Section 1740 declares a violation of any of its provisions to be a misdemeanor, punishable by fine or imprisonment, or both. In *State v. Livingston Concrete etc. Co.*, 34 Mont. 570, 9 Ann. Cas. 204, 87 Pac. 980, these provisions were examined by this court. It was held that the inhibition contained in the latter includes both employer and employee, and renders both subject to the penalty whenever the former causes the employee to work and the latter works for a period longer than eight hours. We shall not undertake to question the contention of counsel that the continuance of work beyond the statutory period is to be deemed a proximate [1] cause of Michael Melville's death. It is the general rule that, where a statute makes a requirement, or prohibits a thing, for the benefit of a person or class of persons, one injured by reason of a violation of it is entitled to maintain an action against him by whose disobedience he has suffered injury; and this is true whether the statute is penal in its character or not. (Wharton on Negligence, sec. 443; Bishop on Noncontract Law, sec. 132; 1 Thompson's Commentaries on the Law of Negligence, secs. 10, 210; *Queen v. Dayton Coal & I. Co.*, 95 Tenn. 458, 49 Am. St. Rep. 935, 30 L. R. A. 83, 32 S. W. 460; *Pauley v. Steam Gauge & L. Co.*, 131 N. Y. 90, 15 L. R. A. 194, 29 N. E. 999; *Pelin v. New York C. Ry. Co.*, 102 App. Div. 71, 92 N. Y. Supp. 468; *Sally v. W. T. Garratt & Co.*, 11 Cal. App. 138, 104 Pac. 325.) A violation of the statute is negligence *per se*, or, properly speaking, legal negligence. (*Osterholm v. Boston & Mont. C. & S. Min. Co.*, 40 Mont. 508, 107 Pac. 499; *Neary v. Northern Pac. Ry. Co.*, 41 Mont. 480, 110 Pac. 226.) But the rule thus broadly stated does not preclude the defendant from showing that the negligence of the plaintiff was a proximate cause of the injury, or that he assumed the risk, and hence is not entitled to recover. The purpose of such statutes being to protect the employee or the public, they do not abrogate these defenses, unless they expressly so declare. Their effect is to render a failure to comply with their requirements negligence *per se*, or legal negligence, and not to excuse negligence in other persons. (4 Thompson's

Commentaries on the Law of Negligence, secs. 210, 4622; Bishop on Noncontract Law, sec. 140; *Osterholm v. Boston & Montana C. C. & S. Min. Co.*, *supra*.)

If a violation of the statute by the employer is negligence, it is equally so on the part of the employee; and if the disobedience, on the one hand, is a proximate cause of the injury, so the dereliction, on the other hand, must be regarded as a contributing proximate cause; for the disobedience is concurrent, and the injury is the result of the concurrent causes which operated to the same end. In such a case the employee cannot recover, because, [2] in alleging the injury, he must, of necessity, allege his own fault. It is the general rule that an action never lies when the plaintiff must base his claim, in whole or in part, on the violation of a criminal or penal law of the state. (*Lloyd v. North Carolina R. R. Co.*, 151 N. C. 536, 66 S. E. 604; *Nottage v. Sawmill Phoenix* (C. C.), 133 Fed. 979; *McGrath v. Merwin*, 112 Mass. 467, 17 Am. Rep. 119; *Louisville etc. Ry. Co. v. Buck*, 116 Ind. 566, 9 Am. St. Rep. 883, 2 L. R. A. 521, 19 N. E. 453; *Little v. Southern Ry. Co.*, 120 Ga. 347, 102 Am. St. Rep. 104, 66 L. R. A. 509, 47 S. E. 953; *Voshefskey v. Hillside C. & I. Co.*, 21 App. Div. 168, 47 N. Y. Supp. 386; Thompson's Commentaries on the Law of Negligence, secs. 10, 204, 249.) This rule finds expression in section 6192 of the Revised Codes, as follows: "Between those who are equally in the right, or equally in the wrong, the law does not interpose." If, therefore, Michael Melville had survived, he could not have maintained an action, for the obvious reason that the evidence discloses, in the first place, that his injury was due to his own reckless conduct, and, in the second place, if this were not so, for the reason that he would have to rely on the violation of the statute by the defendant and thus show that he was himself *in pari delicto* with the defendant, and hence base his claim upon his own criminal conduct.

Counsel insist, however, that the statute, *supra*, creates a cause of action in favor of the wife and children because of the wrong [3] done to them; and that, since the defendant's violation of the penal statute was a proximate cause of the death of the hus-

band and father, the death was caused by its wrongful act, within the meaning of the statute, without regard to the negligence of which the deceased was himself guilty. In other words, the defenses of contributory negligence, assumption of risk, *etc.*, which would have been available against the deceased if he had brought the action, are not available to the defendant in this action. This contention presents the real question in the case, *viz.*: Do the words of the statute "wrongful act or neglect of another" imply actionable wrong or negligence toward the deceased, or toward the surviving wife and children? It is thus made necessary to examine and construe the statute in the light of its history and the expression of opinion by the courts generally as to the purpose of such enactments.

At the common law one who was injured by the wrongful act of another had his action for the wrong. If he died before his action was brought, his right of action died with him. If he had brought his action, but died before judgment, the action abated. So, also, it was the rule that for the death of one person, caused by the wrongful act of another, there was not any remedy by civil action. (*Dillon v. Great Northern Ry. Co.*, 38 Mont. 485, 100 Pac. 960.) To avoid this condition the English Parliament enacted what is commonly known as Lord Campbell's Act (9 & 10 Vict. 93). This statute created a new right of action in favor of the kindred of the deceased for the damage sustained by them through the death of the deceased. In 1872 the legislature of the territory of Montana enacted a statute containing two sections, the first of which was substantially the first section of Lord Campbell's Act. The second was a modification of the second section of that Act, in that it limited the amount of recovery and also the time within which the action might be brought. This Act was as follows:

"Sec. 1. Whenever the death of a person shall be caused by (a) wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who,



or the corporation or company which would have been liable if death had not ensued, shall be liable for an action for damages, notwithstanding the death of the person injured and although the death shall have been under such circumstances as amount in law to felony.

"Sec. 2. Every such action shall be brought by, and in the name of, the personal representatives of such deceased persons, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages, not exceeding twenty thousand dollars, as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next kin of such deceased person: Provided, that every such action shall be commenced within three years after the death of such person." (Codified Statutes 1871-72, Chap. 61.)

The statute was thereafter retained in the various compilations and revisions of the laws of the territory and state until the Revision of 1895, from which it was omitted. (Rev. Stats. 1879, 5th Div., secs. 491, 492; Comp. Stats. 1887, 5th Div., secs. 981, 982.) In 1877 the territorial legislature enacted a complete Code of Civil Procedure. Section 14 of that Code is identical with section 6486 of the Revised Codes, *supra*. This provision was doubtless copied from the Code of Civil Procedure of California, as amended by the Act of March 24, 1874. (Cal. Code Civ. Proc., sec. 377.) However this may be, it has ever since been retained as a part of our Code of Civil Procedure. (Rev. Stats. 1879, 1st Div., sec. 14; Comp. Stats. 1887, 1st Div., sec. 14; Code Civ. Proc. 1895, sec. 579; Rev. Codes, sec. 6486.) The purpose had in view by the legislature is apparent. It was to provide the procedure by which the right of action created by the first section might be enforced, and to substitute it in the place of the second section of the older Act. The older Act was not

repealed, but was allowed to stand undisturbed, except so far as the later Act, by implication, modified and became a substitute for the second section of it. The modification wrought by it was to except minors from its operation, to omit the limitation as to the amount of recovery and as to the time within which the action must be brought, and to authorize the heirs, as well as the personal representative, to maintain the action; whereas under the old statute it could be maintained by the personal representative only. It is thus apparent that the cause of action contemplated by the enactment of 1877 was the same as that created by the older Act; for the retention of both provisions in all subsequent compilations and revisions of the laws, up to the adoption of the Codes of 1895, the one in the Code of Civil Procedure and the other among the general laws, required both to be construed together as establishing the law on the subject, and compels the conclusion that the later Act, though its terms are appropriate to confer a right, was not intended to confer a different right from that created by the older. The meaning of the expression "wrongful act or neglect of another" thus became established and clearly limited to those cases only wherein the death is wrongful as against the deceased, and to preclude recovery when death was due to the decedent's own fault. And though the legislature omitted from the Codes of 1895 the general provision creating the right, and retained only the provision as now incorporated in the portion of the Code devoted to the subject of Civil Procedure, it evidently did so, not with the intention of creating a new right of action, but upon the theory that the provision as it now stands would effectually preserve the right as then declared by the omitted provision. This conclusion becomes necessary when we observe that the Code of Civil Procedure of 1895 declared: "The provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments." (Code Civ. Proc. 1895, sec. 3454.) The same provision is found in the present Code. (Rev. Codes, sec. 8062.)

While this court has never expressly determined the question at bar, it has in many cases recognized the rule that recovery can be had only in a case in which the deceased was himself without fault. Some of the decisions of this court were made prior to the adoption of the Codes of 1895. Many more of them have been made since that time. We cite the following: *Johnson v. Boston & Mont. Min. Co.*, 16 Mont. 164, 40 Pac. 298; *Thompson v. Montana C. Ry. Co.*, 17 Mont. 426, 43 Pac. 496; *Dillon v. Great Northern Ry. Co.*, *supra*; *Meehan v. Great Northern Ry. Co.*, 43 Mont. 72, 114 Pac. 781; *Neary v. Northern Pac. Ry. Co.*, 41 Mont. 480, 110 Pac. 226; *Bracey v. Northwestern Imp. Co.*, 41 Mont. 338, 137 Am. St. Rep. 738, 109 Pac. 706; *Poor v. Madison R. P. Co.*, 41 Mont. 236, 108 Pac. 645; *O'Brien v. Corra-Rock Island M. Co.*, 40 Mont. 212, 105 Pac. 724; *Neary v. Northern Pac. Ry. Co.*, 37 Mont. 461, 19 L. R. A., n. s., 446, 97 Pac. 944; *Riley v. Northern Pac. Ry. Co.*, 36 Mont. 545, 93 Pac. 948; *Mulville v. Pacific M. L. Ins. Co.*, 19 Mont. 95, 47 Pac. 650; *Hunter v. Montana Central Ry. Co.*, 22 Mont. 525, 57 Pac. 140.

The interpretation thus given the statute by the legislature, and impliedly by these decisions of this court, has become so firmly established as the rule of decision in this jurisdiction that we do not feel justified in departing from it. To sustain the plaintiff's contention would be to adopt an interpretation which the legislature never intended that the statute should have and thus destroy defenses of which defendant cannot be deprived, except by Act of the legislature. If a change should be wrought, it is the office of that body to make it, and not of this court.

Similar statutes have been enacted in many of the states of the Union, and have been under consideration by the courts. We shall not enter into an examination of the numerous decisions interpreting them. The following more or less directly support our conclusion: *Northern Pacific Ry. Co. v. Adams*, 192 U. S. 440, 48 L. Ed. 513, 24 Sup. Ct. Rep. 408; *McDonald v. Eagle & Phoenix M. Co.*, 68 Ga. 839; *Casey v. Louisville & N. Ry. Co.*, 84 Ky. 79; *Jones v. Manufacturing & I. Co.*, 92 Me.

565, 69 Am. St. Rep. 535, 43 Atl. 512; *Louisville Ry. Co. v. Raymond's Admr.*, 135 Ky. 738, 27 L. R. A., n. s., 176, 123 S. W. 281; *Hill v. Pennsylvania Ry. Co.*, 178 Pa. 223, 56 Am. St. Rep. 754, 35 L. R. A. 196, 35 Atl. 997; *State v. Manchester & L. R. Co.*, 52 N. H. 528; *Clark's Admr. v. Louisville & N. Ry. Co.*, 101 Ky. 34, 36 L. R. A. 123, 39 S. W. 840; *Watts v. Murphy*, 9 Cal. App. 564, 99 Pac. 1104; *Schneider v. Market St. Ry. Co.*, 134 Cal. 482, 66 Pac. 734. (See, also, 1 Shearman & Redfield on the Law of Negligence, sec. 65; Thompson's Commentaries on the Law of Negligence, sec. 7071.)

Counsel for the plaintiffs cite and rely with confidence on the case of *Northern Pac. Ry. Co. v. Adams*, 116 Fed. 324, 54 C. C. A. 196. This was an action for wrongful death under the statute of Idaho identical with section 6486, *supra*. The trial court instructed the jury as follows: "You are not to consider what was the duty of this carrier toward Mr. Adams, who was killed, but the duty which the defendant owed to these plaintiffs; and the duty which they have the right to exact from the defendant in this case is the same duty which the defendant company owed to the public in general." The circuit court of appeals, by affirming the judgment in favor of plaintiffs, approved the above instruction, thus holding, in effect, that the right to recover was granted by the statute and existed without reference to what right the deceased would have had, had he survived the injuries and had himself brought an action. In reversing the judgment, the supreme court of the United States (192 U. S. 440, 48 L. Ed. 513, 24 Sup. Ct. Rep. 408) said: "The two terms, therefore, 'wrongful act' and 'neglect,' imply alike the omission of some duty, and that duty must, as stated, be a duty owing to the decedent. It cannot be that, if the death was caused by a rightful act, or an unintentional act with no omission of duty owing to the decedent, it can be considered wrongful or negligent at the suit of the heirs of the decedent. They claim under him, and they can recover only in case he could have recovered damages had he not been killed, but only injured. The company is not under two different measures of

obligation—one to the passenger and another to his heirs. If it discharges its full obligation to the passenger, his heirs have no right to compel it to pay damages.”

The judgment is affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

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PERKINS, APPELLANT, v. ALLNUT, RESPONDENT.

(No. 3,223.)

(Submitted January 15, 1913. Decided February 10, 1913.)

[130 Pac. 1.]

*Oral Contracts—Real Property—Statute of Frauds—Evidence—Admissibility—Breach by Plaintiff—Part Payments—Recovery Back.*

*Oral Contracts—Real Property—Statute of Frauds—Evidence—Admissibility.*

1. Where plaintiff sought to recover money on a demand loan, defendant was properly allowed to introduce testimony tending to show that the money paid him by the former was not a loan, but a partial payment upon the purchase price of real property sold under an oral contract, even though such contract of purchase was invalid, and therefore unenforceable, under the statute of frauds.

*Same—Breach by Plaintiff—Part Payments—Recovery Back.*

2. A purchaser of real property under an oral agreement, who has made a partial payment on the purchase price and then voluntarily terminates the agreement, cannot recover back such payment in the absence of a showing that defendant is unable or unwilling to carry out the contract.

*Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.*

ACTION by R. L. Perkins against John J. Allnut. Judgment for defendant, and plaintiff appeals. Affirmed.

*Messrs. Baker & Kurtz*, for Appellant, submitted a brief; *Mr. Kurtz* argued the cause orally.

Mr. Edward D. Noonan, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The defendant recovered judgment in the court below, and from that judgment and an order denying a new trial plaintiff appealed.

The action was instituted to recover \$837.64, alleged to be due to the plaintiff upon an express contract. According to the theory of the complaint, the transaction between the plaintiff and the defendant constituted, in effect, a demand loan. The answer denies the material allegations of the complaint and sets forth the defendant's version of the transaction, which is that the money advanced by plaintiff to defendant was a partial payment upon the purchase price of a piece of real estate which plaintiff agreed to purchase from defendant for \$2,500. Upon the trial, after plaintiff had made out a *prima facie* case according to his theory and had rested, the defendant, over objection, introduced oral evidence of the agreement under which he contended the plaintiff advanced the money. Upon cross-examination it was developed that the agreement upon which defendant relied was in parol, and counsel for plaintiff then moved to strike out all the evidence relating to such contract. The court denied the motion, and this ruling presents the only question for our determination.

Counsel for appellant contend that, since the contract relied upon by the defendant is invalid under the statute of frauds (Rev. Codes, secs. 5017, 5091), it cannot be appealed to by him unless he shows himself entitled to equitable relief. Counsel [1] err, however, in failing to distinguish between facts necessary to entitle one to affirmative relief, and facts sufficient to constitute a defense. The parol agreement for the sale of land was not illegal or absolutely void; it was voidable—that is, it was unenforceable. (*Ducie v. Ford*, 8 Mont. 233, 19 Pac. 414; *Browne on Statute of Frauds*, sec. 135; 20 Cyc. 279; 9 Ency.

of Pl. & Pr. 706.) And for this reason defendant would not be heard to insist upon a demand for the balance due him on the contract, but this rule does not preclude him from disclosing what the facts actually were, as a defense to the plaintiff's claim that the money was advanced as a loan. The general verdict of the jury is a finding that defendant's version of the transaction is the correct one and that the money was not advanced as a loan.

The verdict is not attacked upon the ground of the insufficiency of the evidence to support it—indeed, such an attack could not well be made; and therefore, for the purposes of this appeal, it is established that the money which plaintiff advanced was a partial payment upon the purchase price of real estate [2] under a parol agreement, and that plaintiff voluntarily terminated such contract. Under this state of facts, the rule that plaintiff cannot recover back such partial payment, in the absence of a showing that defendant is unable or unwilling to carry out the contract, is recognized quite uniformly. (*Riley v. Williams*, 123 Mass. 506; *Day v. Wilson*, 83 Ind. 463, 43 Am. Rep. 76; *Plummer v. Bucknam*, 55 Me. 105; *Durham C. L. & I. Co. v. Guthrie*, 116 N. C. 381, 21 S. E. 952; *York v. Washburn* (C. C.), 118 Fed. 316, affirmed by circuit court of appeals, 129 Fed. 564, 64 C. C. A. 132; *Venable v. Brown*, 31 Ark. 564; *McKinney v. Harvie*, 38 Minn. 18, 8 Am. St. Rep. 640, 35 N. W. 668; *Cobb v. Hall*, 29 Vt. 510, 70 Am. Dec. 432; *Johnson v. Puget Mill Co.*, 28 Wash. 515, 68 Pac. 867; *Browne on Statute of Frauds*, sec. 122.)

To test the correctness of the trial court's ruling, it is only necessary, with the facts before us, as established by the jury's verdict, to inquire what the result would have been had the defendant's evidence been excluded. The plaintiff would have recovered for money advanced as a loan, when in fact such a transaction never occurred between the parties.

Plaintiff pleaded and relied upon a particular contract, and the defendant was at liberty to prove anything tending to show that the allegations of the complaint were not true. This he

could do by showing that there was not any contract whatever entered into, or by showing that the contract actually made was altogether different from the one asserted by the plaintiff, and this, too, even though in doing so he disclosed a contract unenforceable or even void. (*Stewart v. Thayer*, 170 Mass. 560, 49 N. E. 1020; 9 Cyc. 73; 4 Ency. of Pl. & Pr. 941.)

The trial court's ruling was correct, and the judgment and order are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

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QUONG WING, RESPONDENT, v. KIRKENDALL, COUNTY  
TREASURER, APPELLANT.

(No. 3,205.)

(Submitted January 28, 1913. Decided February 10, 1913.)

[130 Pac. 2.]

*Courts—United States Supreme Court—Decisions—Conclusiveness.*

1. The decision of the supreme court of the United States on a federal question is conclusive upon a state supreme court.

*Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.*

ACTION by Quong Wing against Thomas B. Kirkendall, as treasurer of the county of Lewis and Clark. Judgment for plaintiff, and defendant appeals. Affirmed.

Cause submitted on briefs of counsel.

Mr. Albert J. Galen, Attorney General, and Mr. W. H. Poorman, Assistant Attorney General, for Appellant.



*Messrs. Wight & Pew, for Respondent.*

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This cause was heretofore before this court. (*Quong Wing v. Kirkendall*, 39 Mont. 64, 101 Pac. 250.) On writ of error it was removed to the supreme court of the United States, where the judgment of this court was affirmed. (*Quong Wing v. Kirkendall*, 223 U. S. 59, 56 L. Ed. 350, 32 Sup. Ct. Rep. 192.) In disposing of the case upon the pleadings as then drawn, the federal court, however, intimated strongly that, if in its operations section 2776, Revised Codes, applies only to persons of the Chinese race, it would be held invalid as contravening the provisions of the Fourteenth Amendment to the Constitution of the United States. Upon the return of the *remittitur* to the district court, counsel for plaintiff amended the complaint to meet the views of the supreme court of the United States, and to bring the case within the rule announced in *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064. To this amended complaint, a general demurrer was interposed. The trial court overruled the demurrer, and the county attorney, electing to stand upon his pleading, suffered judgment to be entered against the defendant, and appealed.

The controversy now presents a federal question upon the [1] decision of which the judgment of the supreme court of the United States is conclusive. However reluctant we may be to subscribe to the doctrine announced in *Yick Wo v. Hopkins*, above, the decision in that case is binding upon us. Upon the authority of the former decision of this case by the supreme court of the United States, and the case of *Yick Wo v. Hopkins*, above, the judgment is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

**HELENA LIGHT AND RAILWAY CO., APPELLANT, v. CITY  
OF HELENA, RESPONDENT.**

(No. 3,194.)

(Submitted January 9, 1913. Decided February 13, 1913.)

[130 Pac. 446.]

***Municipal Corporations—Police Power—Street Railroads—  
Statutory Construction—Lighting of Tracks—Invalid Ordinance.***

**Cities and Towns—Police Power—Extent and Exercise.**

1. The extent of the police power of a municipality must be ascertained from the law creating it, and the laws of the state upon the subject; it cannot be surrendered, alienated, abridged or enlarged by contract, nor delegated, even though the legislature give its consent.

**Same—Street Railroads—Regulation—Police Power—Statutory Construction—Lighting of Tracks.**

2. *Held*, under the rule of statutory interpretation, applicable alike to an ordinance, that where general words follow particular and specific ones, the former must be construed to mean things of the same kind, that a provision in an ordinance granting a franchise to a street railway company reserving in the city the right to "adopt such other and further regulations, rules," etc., as the council might see fit to impose, had reference to and included only regulations treated of and particularized in preceding sections, viz., police regulations, and therefore did not embrace, in the absence of a specific agreement to that effect, the power to compel the company to light its tracks within the corporate limits without cost to the city—a matter not included within the purview of the term "police regulations."

**Same—Powers—How to be Determined and When to be Denied.**

3. A municipality has only such powers as are expressly conferred by the law creating it, and such as are necessarily implied and indispensable in order to accomplish the purpose of its creation; and when there is a fair and reasonable doubt as to the existence of the particular power, it must be resolved against the municipality and the power denied.

**Same—Street Railroads—Lighting Tracks—Invalid Ordinance.**

4. *Held*, that subdivision 12 of section 3259, Revised Codes, granting city or town councils power to compel "the lighting of any railroad track \* \* \* within a city or town, the cars of which are propelled by steam or otherwise," etc., at the expense of the owner, has no application to street railroads, and that, therefore, an ordinance requiring a street railway company to light its tracks within the corporate limits without expense to the city was void.

***Appeal from District Court, Lewis and Clark County; J.  
Miller Smith, Judge.***

ACTION by the Helena Light and Railway Company against the city of Helena. Decree for defendant, and plaintiff appeals. Reversed and remanded.

*Messrs. Wm. Wallace, Jr., John G. Brown, and T. B. Weir*, for Appellant, submitted a brief and one in reply to that of Respondent; oral argument by *Messrs. Wallace and Brown*.

The intention of the legislature that only the steam railroads of commerce were meant to be covered by subdivision 12 of section 3259, Revised Codes, is clearly shown. The use of the term "street railroads" in the succeeding subsections 13 and 66 clearly shows that the legislators recognized the classes of railroads, and when they wanted laws to apply to them, used such words so as to put it beyond question. The intention of the legislature to exclude street railroads is also shown by the later Act of 1911, Chapter 98, which specifies that street railroads shall only pay a part of such cost of lighting. The object sought to be obtained shows it was not their intention to require the lighting of the way of a comparatively slow moving vehicle which has the means of and is expected to stop in short distance and upon sudden notice. No one can with reason claim this section of the Act to be a grant of power to compel either a steam or street railway to light city streets, and that is what is here sought to be accomplished. "But it is clear that, under the guise of protecting citizens from passing trains at public crossings, the city cannot enter into a general system of street lighting at every point where a railroad track crosses a public street." (*City of Shelbyville v. Cleveland etc. Ry. Co.*, 146 Ind. 66, 44 N. E. 929.)

The foregoing case is expressly affirmed and the city censured for attempting to create a lighting district under the guise of protecting its citizens, in *Cleveland etc. Ry. v. City of Connersville*, 147 Ind. 277, 62 Am. St. Rep. 418, 37 L. R. A. 175, 46 N. E. 579. At most it is only to compel the lighting of a track for the protection of such citizens as may be compelled to use or cross it. This being true, the intention of the legislature is

clear that what is aimed at is protection against steam railroads, heavy trains of cars or engines that are not expected to, and for practical purposes cannot, stop at every corner if necessary. (*Atlantic etc. Ry. v. State*, 135 Ga. 545, 69 S. E. 725; *State v. Hamilton*, 33 Nev. 418, 111 Pac. 1026.)

Again, a reading of section 12 as it was put into the Codes shows by the latter part of the section that the railroads of commerce were the ones it deals with. It speaks of power "to require the construction of crossings \* \* \* where said track intersects or crosses any street, alley or public highway, fix and determine \* \* \* the grade thereof, etc." Surely a street railway was not contemplated as intersecting streets. Nor do we believe they meant here to require certain kinds of crossings when in the very next section they require street railroads to conform to grade. A construction such as the lower court gave to section 12 makes it and section 13 absurdities, and no Act is ever construed to produce absurdities. (*Dekelt v. People*, 44 Colo. 525, 99 Pac. 330; *In re King*, 105 Iowa, 320, 75 N. W. 187; *St. Louis etc. Ry. v. Batesville*, 86 Ark. 300, 110 S. W. 1047; *Curry v. Lehman*, 55 Fla. 847, 47 South. 18; *Advisory Board of Coal Creek etc. v. Levandowski* (Ind. App.), 84 N. E. 346; *Logan County v. Carnahan*, 66 Neb. 685, 92 N. W. 984, 95 N. W. 812; *In re Howard*, 80 Vt. 489, 68 Atl. 513.)

The commonly understood sense or meaning of the words "railroad" and "railway" furnishes us some criterion to go by in interpreting this Act. In *Daly Bank etc. v. Great Falls etc. Co.*, 32 Mont. 298, 80 Pac. 252, the very excellent rule is laid down that "where doubt arises as to the meaning of the term 'railway corporation' as used in that section, the doubt must be resolved not merely by the popular definition of the term 'railway' but from the general legislation respecting the subject matter, having in mind the evident purpose to be accomplished by these enactments."

The writer investigated through various street railways the question of whether or not there was any statute similar to the one here under discussion in any state. While we failed to find

in any state a statute like it, we did find a statute in Ohio (Gen. Code, sec. 3762), giving cities the power to require a bridge or railway located in whole or in part in such corporation (municipal) or any portion thereof to be lighted. The statute has been interpreted to include interurban railways, the opinion, however, clearly distinguishing them from street railways, the court saying: "Interurban railways, by analogy of statutes regulating the nature of business conducted, and mode of operation now belong to the class railroads, rather than that of street railways." (*Ottawa v. Ohio Elec. Ry. Co.*, 13 Ohio C. C., n. s., 561.)

Montana statutes upon the subject of railways have been construed by the United States court of appeals in a very well-considered case, valuable also for the very full citations in it. In this connection we would call attention to the fact that the decision referred to announces the rule that the character of the use and not the motive power is the test. It is said by that court: "We have no power to insert 'street railways' into this section of the Act, with the knowledge we have that all the other provisions of the Act refer in clear, plain and unequivocal terms to other kinds of railways or railroads. Especially is this true when we find Acts passed at the same session where the word 'street' is used as a prefix to the word 'railway' or 'railroads' in all Acts intended to apply to street railroads." (*Massachusetts Trust Co. v. Hamilton*, 88 Fed. 591, 32 C. C. A. 46.) This decision is cited and to all practical purposes affirmed in *Central Trust Co. v. Warren*, 121 Fed. 323, 58 C. C. A. 289. While it is true that the general rule is that the interpretation or meaning of the word "railroad" is to be determined from the general legislation and intention of the legislature, there are some authorities which may prove of assistance. General statutes as to railroads or railways have been held as not applying to street railways in the following instances: Eminent domain. (*Thompson etc. Co. v. Simon*, 20 Or. 60, 23 Am. St. Rep. 86, 10 L. R. A. 251, 25 Pac. 147; *Murray etc. Co. v. Milwaukee etc. Co.*, 110 Wis. 555, 86 N. W. 199; *Galveston etc. Ry. v. Houston Electric*

*Ry. Co.*, 57 Tex. Civ. App. 170, 122 S. W. 287.) Stopping trains when crossing "railroads." (*Byrne v. Kansas City etc. Ry.*, 61 Fed. 605, 24 L. R. A. 693.) An ordinance as to trains and engines. (*Hill v. Rome etc. Co.*, 99 Ga. 103, 28 S. E. 631.) Lien of a judgment on railroad property. (*Fidelity etc. Co. v. Douglas*, 104 Iowa, 532, 73 N. W. 1039; *Manhattan Trust Co. v. Sioux City Cable R. Co.*, 68 Fed. 82.) Constitutional provision as to taxes. (*San Francisco etc. R. Co. v. Scott*, 142 Cal. 222, 75 Pac. 575; *City of Newark v. Merchants' Ins. Co.*, 55 N. J. L. 145, 26 Atl. 137.) Statute as to responsibility for accidents. (*Lincoln etc. Ry. v. McClellan*, 54 Neb. 672, 69 Am. St. Rep. 736, 74 N. W. 1074.) Statute of limitation of railroad suits. (*North Hudson County Ry. v. Flanagan*, 57 N. J. L. 236, 30 Atl. 476.) Fellow-servant laws. (*Riley v. Galveston City Ry. Co.*, 13 Tex. Civ. App. 247, 35 S. W. 826; *Funk v. St. Paul etc. Ry.*, 61 Minn. 435, 52 Am. St. Rep. 608, 29 L. R. A. 208, 63 N. W. 1099; *Sams v. St. Louis etc. Co.*, 174 Mo. 53, 61 L. R. A. 475, 73 S. W. 686.) Provisions as to penalties as to excess fares. (*Moneypenny v. Sixth Ave. R. R. Co.*, 4 Abb. Pr., n. s., 357.) Laborer's lien. (*Front St. Cable Ry. Co. v. Johnson*, 2 Wash. 112, 11 L. R. A. 693, 25 Pac. 1084; *Manhattan Trust Co. v. Sioux City Cable Co.*, 68 Fed. 82; *Massillon etc. Co. v. Cambria Iron Co.*, 59 Ohio St. 179, 52 N. E. 192.) Provision as to occupying street crossings. (*Howard v. Union etc. Co.*, 156 Mass. 159, 30 N. E. 479.) Railway Commission Acts. (*Board of Railroad Commrs. v. Market St. Ry. Co.*, 132 Cal. 677, 64 Pac. 1065; *Kansas City etc. Co. v. Board*, 73 Kan. 168, 84 Pac. 755.) Forbidding consolidations. (*Scott v. Farmers' etc. Bank*, 97 Tex. 31, 104 Am. St. Rep. 835, 75 S. W. 7; *Appeal of Montgomery*, 136 Pa. 96, 9 L. R. A. 369, 20 Atl. 399.) Statute exempting from stock subscription liability. (*Ferguson v. Sherman*, 116 Cal. 169, 37 L. R. A. 622, 47 Pac. 1023.) It has also been held that the term "railroad," without any qualifying prefix, applies to the steam railroads of commerce only. (*State v. Duluth etc. Ry. Co.*, 76 Minn. 96, 57 L. R. A. 63, 78 N. W. 1032.) That a street railway grant does not authorize a steam road to occupy streets

is held in a very well-considered case by Judge Baldwin, dealing fully with this subject. (*Canastota Knife Co. v. Newington etc. Co.*, 69 Conn. 146, 36 Atl. 1107.)

If we adopt the far-fetched construction that section 12 applies to street railroads, it is repealed by section 4 of Chapter 98 of the Laws of 1911, which expressly provides that lighting districts may be created, and in the event a street railway is within the district, it may be charged "for such part of the entire cost and expense of such installation and maintenance, not exceeding one-sixth thereof, as the city council may determine." This Act cannot be construed otherwise than as an express repeal of the construction here sought to be given to subsection 12, *supra*, and its preceding enactments of 1895, 1893 and 1887. (*State v. Courtney*, 27 Mont. 378, 71 Pac. 308; *Dennis v. Moses*, 18 Wash. 537, 40 L. R. A. 302, 52 Pac. 333; *People v. Dobbins*, 73 Cal. 257, 14 Pac. 860; *Wellsburg etc. R. Co. v. Panhandle Traction Co.*, 56 W. Va. 18, 48 S. E. 746; *Rodgers v. United States*, 185 U. S. 83, 46 L. Ed. 816, 22 Sup. Ct. Rep. 582; *Joseph Speidel Grocery Co. v. Warder*, 56 W. Va. 602, 49 S. E. 534.) It is a well-settled rule that where general terms in one part of a statute are inconsistent with more specific or particular provisions in another part, the particular provisions will be given effect. (36 Cyc. 1130, notes, 68, 69.)

*Mr. H. S. Hepner*, and *Mr. Edward Horsky*, for Respondent, submitted a brief and one in answer to Appellant; *Mr. Horsky* argued the cause orally.

Apart from subdivision 12, the city has the police power conferred in its "general welfare clause" in subdivision 1 of section 3259. (*City of Helena v. Kent*, 32 Mont. 279, 4 Ann. Cas. 235, 80 Pac. 258, and cases there cited.) The requirement for lighting tracks is essentially a police regulation. (*Village of St. Mary v. Lake Erie etc. Co.*, 60 Ohio St. 136, 53 N. E. 795.) The right to exercise the police power cannot be surrendered, alienated or abridged, either by the legislature or municipality, by any grant, contract or delegation. Whatever is necessary

to preserve and promote the health, safety, convenience and comfort of the public, must be regarded as reserved. (3 McQuillin on Municipal Corporations, sec. 953, p. 2086 *et seq.*, and cases cited; 1 McQuillin on Municipal Corporations, sec. 382, p. 842; 3 Dillon on Municipal Corporations, 2060, and cases cited; *Northern Pac. Ry. Co. v. Duluth*, 208 U. S. 583, 52 L. Ed. 630, 28 Sup. Ct. Rep. 341.) Hence when a franchise or privilege is granted to use the city street for a public service, the grantee accepts the right upon the implied condition that it shall be held subject to the reasonable and necessary exercise of the police power of the state, operating either through legislative enactment or municipal action. (3 Dillon on Municipal Corporations, 2060, and cases cited.) "Thus the legislature or the city acting under delegated authority may require a railroad company to light such portion of the railroad as is within the city limits." (*Pittsburg etc. R. Co. v. Hartford City*, 170 Ind. 674, 20 L. R. A., n. s., 461, 82 N. E. 787, 85 N. E. 362; *Cincinnati etc. R. Co. v. Sullivan*, 32 Ohio St. 152.) "A regulation which shows on its face that the end contemplated is the securing of reasonable safeguards against danger will ordinarily be presumed to be valid, and will not be interfered with on light grounds, or where the regulation can fairly be said to tend toward a safer condition." (36 Cyc. 1447.) "A regulation is not unreasonable or invalid from the mere fact that it will require a large outlay of money by the company." (*Id.*, citing *People v. Detroit United Ry.*, 134 Mich. 682, 104 Am. St. Rep. 626, 63 L. R. A. 746, 97 N. W. 36; *People v. Detroit Citizens' St. R. Co.*, 116 Mich. 132, 74 N. W. 520.) Regulation by cities must be reasonable under the police power. If the regulation is reasonable, it is operative, even if the cost is large. (36 Cyc. 1405.)

It is true, in general, that in ascertaining the meaning or sense in which given words, such as "railroad" or "railway," are used in a given statute, other portions of the same statute in which the same words are used may be resorted to for comparison to ascertain in what sense such term is used; that is,



in what connection, the context, and what is its intendment, in the light of the employment of the same words in the same piece of legislation. Thus, in the *Hamilton Case* referred to in the investigation of the phrase quoted, "railway corporation," the United States ninth circuit court of appeals held that as the term was employed in section 707 of the 5th Division of the Compiled Statutes of Montana of 1887, it referred only to the steam railroads of commerce; but this was clear in view of sections 702, 703, 704 and 706, in disclosing that the legislature had in mind only steam railroads of commerce, for the said section mentioned could only apply to such railroads of commerce, and not to street railroads. In the case at bar, however, the legislature of 1895 inserted the words "or otherwise," and again the legislature in 1897, to emphasize this intent, passed a new Act, employing the same language. The words so added make the statute self-definitive. Thereby subdivision 12 embraces every sort of a railroad, and removes any doubt that might have existed if such term had not been used. "The word 'railroad' has no such fixed definition as to determine, by its mere use in a statute, if it applies to street railways or not. It may be used in its broad sense to include street railroads or any other kind of railroad on which iron is laid for wheels to run on, whether propelled by steam, electricity, horsepower, or other power—or it may be used in a technical sense and not apply to street railroads." (*Massachusetts etc. Co. v. Hamilton*, 88 Fed. 588, 32 C. C. A. 46.) "The terms 'railroad' and 'railway' are synonymous, and are generally used interchangeably, unless it appears from the connection in which one term or the other is used that a particular kind of road is intended." (*Mobile Light etc. Co. v. Mackay*, 158 Ala. 51, 48 South. 509; *Funk v. St. Paul City R. Co.*, 61 Minn. 435, 52 Am. St. Rep. 608, 29 L. R. A. 208, 63 N. W. 1099; *Philadelphia v. Philadelphia Traction Co.*, 206 Pa. 35, 55 Atl. 762; *Gyger v. Philadelphia City Pass. R. Co.*, 136 Pa. 96, 9 L. R. A. 369, 20 Atl. 399.) "The word 'railway' may include railroads operated by steam as well as those whose cars are propelled by some

other power, yet it is common knowledge that such corporations as belong to the latter class are usually operated as street railways for local convenience." (*Thompson-Houston Electric Co. v. Simon*, 20 Or. 60, 23 Am. St. Rep. 86, 10 L. R. A. 251, 25 Pac. 147.) "Laws relating to taxation of railroads should be construed to include street railroads. City passenger railroads are included in the name railroads." (*Hestonville etc. R. Co. v. City of Philadelphia*, 89 Pa. 210.) "The term 'railroad' as used in 'every railroad shall keep' person on locomotives on look-out ahead, includes railroad operating 'dummy' in the city exclusively engaged in carrying passengers." (*Katzenberger v. Lawo*, 90 Tenn. 235, 25 Am. St. Rep. 681, 13 L. R. A. 185, 16 S. W. 611.) "An Act providing for redress of injuries from neglect or misconduct of 'railroad companies' applies to proprietors of any kind of railroad, whether it is propelled by steam or horse-power on iron or any other kind of rails." (*Johnson v. Louisville City Ry. Co.*, 73 Ky. (10 Bush) 231.) "An Act to enable railroad corporations to borrow money, etc., is sufficiently comprehensive to embrace horse railways." (*Chicago v. Evans*, 24 Ill. 52.) "The word 'railroad,' in its broadest signification, includes a street railroad. When the word is used in a statute, there is no definite rule of construction as to whether it includes street railroads. It may, or it may not, include them. The meaning of the word must depend upon the context and the general intent of the statute in which it is used." (*Bloxham v. Consumers' Electric Light & St. R. Co.*, 36 Fla. 519, 51 Am. St. Rep. 44, 29 L. R. A. 507, 18 South. 444.) But it has been held that when either of the words "railroad" or "railway" is used in a statutory or constitutional provision, and the context is without indication that a particular kind of road is intended, the provision will be held applicable to every species of road embraced in the general sense of the word used. (*Gyger v. Philadelphia City R. R. Co.*, *supra*.) "The term 'railroad' includes street railroad in mechanic's lien statutes where the words used are 'any railroad.'" (*Egan v. Cheshire Street Ry.*, 78 Conn. 291, 61 Atl. 950.) "'Railroad' as used in the Code pro-

viding a penalty for obstructing a railroad includes a street railway operated by horse-power as well as a steam railroad." (*Price v. State*, 74 Ga. 378.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This cause was submitted to the district court upon an agreed statement of facts under the provisions of section 7254, Revised Codes, to have determined the question: "Has the city of Helena the right and power to require the plaintiff, the Helena Light and Railway Company, to light its railway tracks within the corporate limits of said city without cost or expense to the city, and particularly at street intersections?" The court upheld the contention of the city that it has the power and rendered judgment in its favor. The plaintiff has appealed.

The plaintiff is operating its railway under what is referred to in the briefs of counsel as the "Brill Franchise." It also supplies to itself and to the city and its inhabitants electricity for light and power purposes under a second franchise granted to it by the city. The ordinance granting the railway franchise contains this provision:

"Section 2. Rights Granted, Subject to What.—The right and privilege hereby granted is subject, except as herein otherwise provided, to the terms, restrictions and provisions contained in Article III, entitled 'Street Railroads,' on pages 323 to 331, inclusive, of the Revised Ordinances of 1897."

Section 19 of said Article 3, which was in force when the Brill franchise was granted, is as follows: "The city of Helena reserves the right, by resolution or order of the city council, to adopt such other or further regulations, rules or restrictions, with reference to, or for the management of, street railroads, or companies or corporations conducting street railroads within the city of Helena, as the council may from time to time deem proper; and all grants for street railroads shall be construed, taken and held to be subject to the right in this section reserved, whether so expressed in the grant or not."

Section 3259 of the Revised Codes declares: "The city or town council has power: \* \* \* (12) To require the lighting of any railroad track or route within a city or town, the cars of which are propelled by steam or otherwise, and fix and determine the number, style and size of the lamp-posts, burners, lamps and all other fixtures and apparatus necessary for such lighting, and the points of location of the lamp-posts, and to require the construction of crossings on the line of any railroad track or route within the city or town, the cars of which are propelled by steam or otherwise where the said track intersects or crosses any street, alley or public highway, or runs along the same, and to fix and determine the size and kind of such crossings and the grades thereof, and in case the owner of such railroad fails to comply with such requirements, the council may cause the same to be done, and it may assess the expense thereof against such owner, and the same constitutes a lien on any property belonging to such owner within such city or town, and may be collected as other taxes."

The ordinance imposing upon the plaintiff the requirement in question is not incorporated in the agreed statement of facts. What its specific requirements are as to the number of lights required, their character, position, *etc.*, does not appear. This is not important, however, since the question presented is not whether the particular requirements of the ordinance are reasonable, but whether either under the reservation in the general ordinance, which must be read into the Brill franchise, or under the provision of the statute, the council may exact the requirement it has undertaken to make.

1. As to the reservation clause in the ordinance, it is contended that, though the plaintiff by accepting the franchise entered into a contract with the city whereby it bound itself to observe any condition imposed upon it by the city, it did not thereby bind itself to submit to an exaction made of it, which, but for the reservation, it would be wholly beyond the power of the city to make. It is also argued that the general reservation does not impose upon the plaintiff any other duty than

to submit to any reasonable regulation enacted by the city. We do not think the reservation enlarges in any degree the power of the city to enact suitable police regulations to control the construction and operation of railways upon its streets. Upon examination of it we find that it prescribes with great particularity the method to be pursued in constructing them, the character of materials to be used, the grade upon which they shall be laid (on a level with the surface of the street), the portion of the street they shall occupy, the maximum rate of speed at which the cars shall be moved, the points at which the cars must be stopped to receive and discharge passengers, and the duty of the corporation or other person owning the railroad to make the necessary repairs to the tracks and to keep the portion of the street occupied by them planked or paved, as the necessities of the case from time to time require. It imposes the duty of keeping the cars clean and in good repair. It prohibits the carrying of freight. It defines the relative rights of the city and the owners of the railroads, when it becomes necessary to make repairs upon the streets. It reserves the right in the city to require the use by one owner of a single track in common with the owner of another railroad at points where the width of the street does not permit the laying of two tracks. It contains many other provisions guarding the comfort, convenience and safety of the public while traveling on the cars or upon the streets, and declares any violation, by omission or commission, of any of the provisions contained in it a misdemeanor, subjecting the offender to the penalty of a fine. If the owner of a railroad fails to comply with any of its requirements, its franchise may be forfeited. In short, the ordinance is nothing more nor less than a series of police regulations designed to control the operation of the railroad, and thus afford reasonable protection to the public in the use of the streets.

The source of the police power of a municipality is the state. [1] The extent of it must be ascertained from the law creating the municipality, and from the laws of the state bearing upon the same subject. The power cannot be surrendered, alienated

or abridged by contract, nor can it be delegated even with the consent of the legislature. Its exercise is a governmental function. Without it neither the state nor the municipality could protect the public welfare. (*Northern Pac. Ry. Co. v. Minnesota*, 208 U. S. 583, 52 L. Ed. 630, 28 Sup. Ct. Rep. 341; Dillon on Municipal Corporations, sec. 1269; McQuillin on Municipal Corporations, sec. 890.) By parity of reasoning, since the state is the source of this power, it is obvious that it cannot be enlarged or extended by contract or agreement with a private citizen or subject. To assert the contrary is to assert the proposition that a private citizen may by agreement clothe the municipality with a power which the state alone could grant. Therefore, [2] the general expression "such other and further regulations, rules or restrictions," etc., found in the ordinance, must, we think, be taken to refer to, and include only, regulations of the same character as these prescribed in the preceding sections, viz., police regulations. A familiar rule of statutory interpretation is that, where general words follow particular and specific words, the former must be held to mean things of the same kind. (Sutherland on Statutory Construction, sec. 268.) It is true that the particular provisions found in the ordinance preceding the section containing the reservation embody separate and distinct regulations applicable to the subjects with which they deal, yet they all fall under the head of "police regulations," and the principle embodied in the rule, it would seem, should be applied as well to the ordinance as to a statute in which the enumeration of specific things followed by general words is all embodied in a single section. To broaden the meaning of the expression so far as to make it include regulations pertaining to subjects wholly beyond the purview of its police power would be to hold that the city may exact of the plaintiff submission to any sort of burden or imposition which the council might deem it expedient to impose, including, for instance, a requirement that the plaintiff, besides lighting its tracks upon the streets upon which they lie, shall also pave and keep in repair throughout their entire length those portions

of the same streets. It cannot be questioned that such a requirement would not be within the lawful exercise of the police power. It would simply be an imposition upon the plaintiff of a duty which rests exclusively upon the municipality itself. In accepting the franchise from the city, the plaintiff impliedly agreed to become subject to any reasonable police regulation which was in force at the time, as well as to any that might thereafter be enacted. It did not require an express agreement on this subject to enable the city to exact compliance of the plaintiff. (Dillon on Municipal Corporations, sec. 1269.) That the city might by an express agreement incorporated in the grant have exacted plaintiff's consent to submit to any imposition which it chose to impose upon it we do not doubt. The plaintiff was not obliged to accept the franchise. It took it with whatever burden was attached to it. We do not think, however, that, in the absence of a specific agreement to that effect, the city has the right to impose upon it any burden other than such as it might impose upon any other person in the same position.

2. This brings us to the real question at issue; that is to say: Does the provision of the statute, *supra*, vest in the city the power to make the requirement in question? The rule is [3] established in this jurisdiction that a municipality has only such powers as are expressly conferred by the law creating it, and such as are necessarily implied and are indispensable in order to accomplish the purpose of its creation; and, when there is a fair and reasonable doubt as to the existence of the particular power, it must be resolved against the municipality and the power denied. (*State ex rel. Quintin v. Edwards*, 40 Mont. 287, 20 Ann. Cas. 239, 106 Pac. 695; *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249.) The reason of the rule is that the state has granted in clear and unmistakable terms all that it intended to grant at all. (*Id.*)

The provisions of the statute are not explicit. It is argued that the terms in which it is couched are broad enough to include any road constructed of rails. Whether it was intended

by the legislature to put street railroads in the same class with commercial railroads and make them subject to the same regulations by the municipality is left in doubt. To ascertain its intention, reference must be had to the context in which the provision is found, other provisions pertaining to the same subject, the occasion and necessity calling for the enactment of it, and the remedy had in view.

Section 3259 is an enumeration of the powers of a city council. It confers the power to pass all by-laws, ordinances and resolutions not repugnant to the federal or state Constitution or the Title relating to the government of cities, which may be necessary to carry out the provisions of the Title. (Subdivision 1.) By specific provisions embodied in eighty-one other subdivisions it grants many of the powers included in subdivision 1, besides others not clearly included. Some of them are cumulative in character, but most of them deal with specific subjects. Subdivisions 11, 12, 13 and 66 relate exclusively to railroads. Subdivision 11 grants the power "to regulate and control the laying of railroad tracks and prohibits the use of engines and locomotives propelled by steam or otherwise, or to regulate the speed thereof when used." Subdivision 12 is quoted above. By subdivision 13 is granted the power "to license and authorize the construction and operation of street railroads and require them to conform to the grade of the street as the same are or may be established." Subdivision 66 confers the power to grant to street or other railroads rights of way through the streets or property of the city, to regulate the running and management of the cars, to compel repairs upon a street occupied by a railroad by the owner thereof, to regulate the speed of engines, and to require flagmen at crossings. This last subdivision in terms applies to both commercial and street railroads. We do not attach any significance to the use of the term "railroad" in these subdivisions. Similar provisions were first enacted by the territorial legislature in 1887. (Comp. Stats. 1887, Div. 5, sec. 325, subds. 14 [11], 15 [12], 16 [13].) They have been amended from time to time since, but not in any



particular indicating an intention to change or extend their application. (Laws 1893, p. 113, subds. 14 [11], 15 [12], 16 [13]; Pol. Code 1895, sec. 4800, subds. 11-13; Laws 1897, p. 204, subds. 11-13.) As originally enacted, subdivisions 11 and 12 applied only to railroads propelled by steam locomotives. As they now stand, they include railroads upon which any kind of motive power is used, as is indicated by the expression "or otherwise," now found in subdivisions 11 and 12, but not in the Act of 1887. The terms "railroad" and "railway" were used in the original enactment as synonymous. So they were used in the Act of 1893. They have been used indiscriminately in the same sense in much of the legislation on the subject of railroads and railroad corporations as is pointed out in *Daly Bank & Trust Co. v. Great Falls St. Ry. Co.*, 32 Mont. 298, 80 Pac. 252. In the popular sense they are synonymous. As was said by the supreme court of California in *Ferguson v. Sherman*, 116 Cal. 169, 37 L. R. A. 622, 47 Pac. 1023: "We recognize that the word 'railroad' or 'railway,' as used in a law, is broad enough to include street railroads, and that many cases have arisen where the courts have held that the word does in its signification include such corporations; but, when all has been said, each case has been determined upon its own facts, having in view the circumstances of the case, the context, the presumed intention of the lawmakers, and the general policy of the particular state in regard to the matter, and therefore, while a large number of cases may be cited in which the courts have held that the statutes under consideration dealing with 'railroads' embraced in their provisions street railroads, an equal number could be instanced in which the courts have, under the facts of the case, narrowed and limited the application of the statute, and held that street railroads were not included. It would be difficult, if not impossible, to formulate any rule to govern the determination. In this state the difficulty is much relieved by the distinction which our Codes make between railroad corporations proper and street railroad corporations."

Much of our legislation on the subject of railroads and railroad corporations has no application to street railroads. This is made apparent by the discussion of the provisions which were construed in *Daly Bank & Trust Co. v. Great Falls St. Ry. Co.*, *supra*, and, while the question now before us was not involved in that case, what is said on this subject and especially touching the provision now under consideration should be given weight in arriving at its meaning. It will be observed that the term "railroad" is employed in subdivisions 11 and 12 without qualification. Immediately afterward, in subdivision 13, the distinguishing prefix "street" is used. This same distinction is made in subdivision 66. It is found in sections relating to the assessment of railroads. (Rev. Codes, secs. 2528, 2529.) Again, in section 3808, enumerating the purposes for which corporations may be formed, the same distinction is observed. Yet again it is found in the recent Act of the legislature providing for the establishment of lighting districts in the business portions of cities and towns. (Laws 1911, p. 167.) The frequent use of this prefix indicates the intention of the legislature to maintain the distinction, and suggests that in construing enactments touching railroads they should not be held to apply to street railroads unless the intention that they shall so apply is apparent. The character of their construction, the mode of their operation, the comparatively limited sphere of their activities, distinguish them from the railroads of commerce. Their tracks must conform throughout to the grade of the streets. Their cars are comparatively small and light, and therefore are easily subject to control. They are moved one at a time, or in trains consisting of a single car and a trailer. They are easily operated by one or two men. They are also lighted, and their approach or presence is easily observable. Their rate of speed is low. The danger to operators and the public is, for these reasons, comparatively small. Generally, they may convey passengers only. The operation of commercial railroads requires the use of massive locomotives. They convey passengers as well as freight, often making use of composite

trains. Their trains are made up of many heavy cars which, with the massive locomotives drawing them, render them difficult to control. They extend for long distances. Freight trains cannot be lighted. The movements of all trains must be controlled by signals. Many men are required to operate them. The danger to the operators and the public is proportionately large. Hence, the greater necessity for precautions to protect against danger of accident, and to serve the convenience of the public. These and many other matters which might be mentioned serve to emphasize the distinctive difference in the two kinds of railroads and furnish support to the view that by the employment, in the statute, of the term "railroad" or "railway," without qualification, the legislature does not intend to include street railroads, unless the intention to do so is apparent from the general legislation on the subject, or such intention is apparent from the provisions of the particular statute. (33 Cyc. 34; 36 Cyc. 1348, 1349.)

We refer to a few cases which justify the foregoing statement. In Minnesota it is held that a statute declaring that railroad corporations shall be liable for damages sustained by an agent or servant of the corporation through the negligence of any other agent or servant is not applicable to street railroad corporations. (*Funk v. St. Paul City Ry. Co.*, 61 Minn. 435, 52 Am. St. Rep. 608, 29 L. R. A. 208, 63 N. W. 1099.) The supreme court of Oregon in *Thompson-Houston El. Co. v. Simon*, 20 Or. 60, 23 Am. St. Rep. 86, 10 L. R. A. 251, 25 Pac. 147, determined that a statute authorizing railroad corporations to acquire rights of way by condemnation does not include street railroad corporations. A like conclusion was reached by Judge Taft in *Byrne v. Kansas City, Ft. Scott & M. R. Co.*, 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693, as to the meaning of a section of the Code of Tennessee providing that every engine or train shall be brought to a full stop before crossing an intersecting railroad. It was held that the statute has no application to the crossing by a steam commercial railroad of a horse-car track. In *San Francisco & S. M. El. Ry. Co. v. Scott, Collector*.

*etc.*, 142 Cal. 222, 75 Pac. 575, the court had under consideration the provision of the Constitution of California, providing that the franchise, roadway, roadbed, *etc.*, of all railroads operating in more than one county shall be assessed by the state board of equalization at their actual cash value, and that the same shall be apportioned to the counties, cities and counties, and cities, towns, townships and districts in which such roads are located, in proportion to the number of miles of railway laid in such counties, cities, *etc.* The conclusion was reached that the provision has no application to a street railroad, though it is operated in more than one county. A provision of the Revised Codes (section 4295) declares that a judgment against a railroad corporation for injury to a person or property, for material furnished or work or labor done upon any property of a railroad corporation, shall be a lien within the county where it is recovered on the property of such corporation, and prior and superior to the lien of any mortgage or trust deed provided for in the chapter of the Code of which it is a part. The application of this provision was considered by this court in *Daly Bank & Trust Co. v. Great Falls St. Ry. Co.*, *supra*. The term "railroad" as used therein was held not to include street railroads. The same provision was examined and the same conclusion reached as to its application in *Massachusetts Trust Co. v. Hamilton*, 88 Fed. 588, 33 C. C. A. 46, and *Central Trust Co. v. Warren*, 121 Fed. 323, 58 C. C. A. 289. Many other cases could be cited, but these are sufficient for illustrative purposes.

When we come to analyze the provision of the statute itself, we find that one of the requirements authorized by it manifestly can have no reference to street railroads, *viz.*: "The construction of crossings on the line of the track or route within the city or town \* \* \* where the said track intersects or crosses any street, alley or public highway, or runs along the same, and to fix and determine the size and kind of such crossings and the grades thereof." As already stated, street railroads must of necessity be, and they are, laid on the grade of the street.

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Crossings, therefore, are entirely unnecessary; indeed, they would obstruct rather than add to the safety and convenience of travel along the streets either by foot-passengers or vehicles. Should it be held that the provision for lighting applies, but that the provision for crossings does not? We think not. Taking the subdivision as a whole, it confers in appropriate terms the power to prescribe two police regulations, both of which apply to commercial railroads entering or passing through a city or town, whereas one of them could not have any application to street railroads. When we come to examine subdivision 13, we find that it deals exclusively with street railroads, and that, taken in connection with the general provision contained in subdivision 1, it confers all the powers necessary for the policing of street railroads. We therefore conclude that the provision in [4] question was not intended to apply to street railroads at all. Hence the ordinance is void.

Counsel for the city insist that the ordinance making the requirement of plaintiff to light its tracks is authorized by the general provision found in subdivision 1. Let it be conceded that a city has the implied power to require a commercial railroad to light the streets on which its tracks lie; let it be conceded, also, that it has the implied power to require a street railroad to light its tracks at crossings which may be regarded as dangerous, or even at other points along the tracks exclusively for the convenience of the passengers; nevertheless we do not think that an ordinance under which the city may require the railroad to light the entire length of certain streets, without reference to special conditions rendering their lighting necessary, can be sustained under any view of its police power. The city cannot, under the guise of the exercise of this power, impose upon the railway company the duty which necessarily rests upon itself. (*City of Shelbyville v. Cleveland, C., C. & St. L. Ry. Co.*, 146 Ind. 66, 44 N. E. 929.)

The fact that the ordinance applies especially to street inter-sections does not render it free from objection. Under it the plaintiff is made subject to fine and forfeiture of its charter,

if it fails or refuses to install lights at any point or points designated, whether these be at street intersections or not. Nor do we think that the situation is affected by the fact that the plaintiff has a franchise under which it is furnishing electricity to the defendant and its inhabitants. So far as we can gather from the record, the two franchises have no relation to each other.

The judgment is reversed and the cause is remanded to the district court, with directions to enter judgment for plaintiff.

*Reversed and remanded.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

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MURPHY, RESPONDENT, v. NETT, APPELLANT.

(No. 3,221.)

(Submitted January 15, 1913. Decided February 13, 1913.)

[130 Pac. 451.]

*Wills—Contest of Probate—Undue Influence—Testamentary Incapacity—Insanity—Pleading—Evidence—Declarations—Expert Testimony—Rebuttal—Admissibility.*

Dismissal of Appeal from Judgment—Effect on Appeal from New Trial Order.

1. The fact that his appeal from the judgment was dismissed on motion of respondent does not deprive the appellant of the right to have his appeal from the order denying his motion for a new trial in the same cause, taken subsequently, heard and determined.

*Wills—Contest of Probate—Pleading—Insufficiency—Harmless Error.*

2. Where in a will contest the jury, while making a finding as to testamentary incapacity, failed to find undue influence, though the statement of contest sought to set the instrument aside on both grounds, and the decree was based solely on the finding as made, the question whether the pleading sufficiently alleged undue influence *held* immaterial.

*Same—Undue Influence—Pleading—Sufficiency.*

3. The allegation of undue influence in a statement of contest of a proposed will need not specify with particularity the entire details of the manner in which such influence was exercised; if ultimate facts are alleged from which the legal conclusion of undue influence fairly follows, the pleading is sufficient to support proof.

**Same—Undue Influence—What may Constitute.**

4. Demands and importunities may amount to undue influence, without being coupled with fraud, threats or misrepresentation; whether they do or not depending upon what they were, how persistently and under what circumstances they were employed, and whether the mind of the testator was so infirm as to be overpowered by them.

**Same—Injustice of—Admissibility in Evidence—For What Purpose.**

5. Under the rule that, though the injustice or unreasonableness of a will is not alone sufficient to cause its rejection, it is a circumstance bearing upon the questions of testamentary capacity and undue influence, the facts that the testator's mother (contestant) had transferred all her real and personal property to him and that he knew this before he made his will, naming a sister his sole beneficiary, were properly admitted in evidence.

**Appeal—Improper Admission of Evidence—When Appellant may not Complain.**

6. Where manifestly improper testimony was elicited in response to five separate interrogatories, none of which was objected to, appellant was not in a position to claim error because of the court's refusal to order it stricken from the record.

**Wills—Declarations of One of Several Beneficiaries—When Admissible.**

7. The rule that where there are two or more beneficiaries under a will having a common or several, but not joint, interest in its provisions, the declarations of one of them as to testamentary capacity or undue influence are inadmissible to affect its validity, has no application in a case where the only real beneficiary to be adversely affected by such declarations was declarant (proponent of the instrument), the others, to each of whom was left one dollar, having been beneficiaries in name only.

**Appeal—Instructions—When Appellant may not Complain.**

8. Of an instruction in appellant's favor he cannot complain.

**Wills—Insanity—Invading Province of Jury—Expert Testimony—When not Objectionable.**

9. Where the validity of a will was attacked on the ground that at the time of its execution testator was insane,—contestee asserting that he then had a lucid interval, and contestant maintaining that his ailment did not permit of lucid intervals, the evidence showing that shortly before and soon after the date of the instrument he was shown to have been of unsound mind, dying ultimately of dementia,—rebuttal testimony by insanity experts that in their opinion testator could not have had a lucid interval at the time in question, *held*, not objectionable as invading the province of the jury.

**Same—Capacity to Make—Test—Instruction—Proper Refusal.**

10. While contractual capacity implies, *prima facie*, capacity to make a will, neither is a test for the other, and the presence or absence of one does not conclusively establish the presence or absence of the other; hence, an instruction in a will contest that a less degree of mind is required to execute a will than is necessary to execute a contract was properly refused.

**Same—Evidence—Sufficiency.**

11. Where in a will contest there was ample evidence to sustain it and substantial evidence against its validity, the decree of the trial court will not be disturbed on appeal for alleged insufficiency of the evidence to sustain it.

*Appeal from District Court, Lewis and Clark County; Llew L. Callaway, a Judge of the Fifth Judicial District, presiding.*

WILL CONTEST by Mary Murphy against Anna E. Nett. From an order denying a motion for new trial, defendant appeals. Affirmed.

*Messrs. H. G. & S. H. McIntire*, for Appellant, submitted a brief and one in reply of that of Respondent; *Mr. H. G. McIntire* argued the cause orally.

The allegations of the contest, contained in paragraph 5 thereof, were not sufficient to warrant the introduction of any evidence of undue influence. Briefly stated, the substance of the allegations of undue influence here presented is: That at and prior to the execution of the will in question decedent was weak and ill in body and mind; that he needed care and attention; that Anna Elvira Nett acted as his guardian and custodian of his person and property, and was constantly with him, and that he was entirely dependent upon her for care and attention; that he was under the care of physicians and nurses selected by her; that he was easily influenced by those in whose custody he was; that Anna Elvira Nett acquired and had a great and controlling influence over his mind and will, and was thereby able to and did direct and dictate what he should do in the matters pertaining to his property; that she, prior to the execution of the will, did demand and importune of him to leave his property to her, to the exclusion of his other relatives, and that she did so prevail upon and influence him, and that such will was not his free or voluntary act.

The definition of the words "undue influence" would seem to include some fraud, misrepresentation, coercion or illegal and unlawful act. Influence may be exercised in many ways, but we can scarcely conceive of "undue influence" being exercised without there entering into it some of the elements above stated.

It seems to be a well-settled principle that undue influence must be exercised at the time the will is executed, and must be the reason of its execution. (*Ricks' Estate*, 160 Cal. 467, 117 Pac. 539; *Kilborn's Estate*, 162 Cal. 4, 120 Pac. 762; *Morcel's Estate*, 162 Cal. 188, 121 Pac. 733; *Beyer v. Le Fevre*, 186 U. S.



114, 46 L. Ed. 1080, 22 Sup. Ct. Rep. 765; *Schmidt v. Schmidt*, 201 Ill. 191, 66 N. E. 374; *Francis v. Wilkinson*, 147 Ill. 370, 35 N. E. 150; *Pennsylvania etc. Ins. Co. v. Union Trust Co.*, 83 Fed. 896; *Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45; *Calef's Estate*, 139 Cal. 673, 73 Pac. 539; *Compher v. Browning*, 219 Ill. 429, 109 Am. St. Rep. 346, 76 N. E. 678; *Nelson's Estate*, 132 Cal. 182, 64 Pac. 294; *Ginter v. Ginter*, 79 Kan. 721, 22 L. R. A., n. s., 1024, 101 Pac. 634.) Of course, if undue influence has been exercised prior to the execution of the will, in order that the same be objectionable, or that advantage may be taken of it, the party claiming its existence must allege and prove that such undue influence continued down to the very moment of the execution of the will, and that such execution was the result of such undue influence, and not the free and voluntary act of the testator. We find no allegations in the contest nor proof in the record even tending to show such facts.

It is also well settled that one who has cared for the testator during his illness, and is a relative, is entitled to request testamentary disposition in his favor, and such request, demand or importunity is not an exercise of undue influence. (*Beyer v. Le Fevre, supra.*) One may, therefore, endeavor to obtain a testamentary disposition by the use of any argument which he may see fit to make, provided that no threats, fraud or misrepresentations are made, which would in any way tend to wrongfully influence the testator.

It is also equally well settled that, in order to amount to undue influence, some fraud must be practiced, some threats or misrepresentations made, some undue flattery, or some physical or moral coercion employed, so as to destroy the free agency of the testator. (*In re Murray's Estate*, 11 Pa. Co. Ct. Rep. 263; *Tawney v. Long*, 76 Pa. (26 P. F. Smith) 106; *In re Pensyl's Estate*, 157 Pa. 465, 27 Atl. 669; *In re Logan's Estate*, 195 Pa. 282, 45 Atl. 729; *Herster v. Herster*, 122 Pa. 239, 9 Am. St. Rep. 95, 16 Atl. 342; *Gilbert v. Gilbert*, 22 Ala. 529, 58 Am. Dec. 268; *Patterson v. Lamb*, 21 Tex. Civ. App. 512, 52 S. W.

98; *Trumbull v. Gibbons*, 22 N. J. L. (2 Zab.) 117; *McCulloch v. Campbell*, 49 Ark. 367, 5 S. W. 590.)

The influence of gratitude, affection or attachment, or the desire of gratifying the wishes of another, do not amount to undue influence. (*Campbell v. Carlisle*, 162 Mo. 634, 63 S. W. 701, 704; *Williams v. Goude*, 3 Ecc. R. 252, 261; *Duffield v. Robeson*, 2 Harr. (Del.) 375; *In re Disbrow's Estate*, 58 Mich. 96, 24 N. W. 624; *Patterson v. Lamb*, 21 Tex. Civ. App. 512, 52 S. W. 98; *In re Halbert's Will*, 15 Misc. Rep. 308, 37 N. Y. Supp. 757; *In re Gleepin's Will*, 26 N. J. Eq. (11 C. E. Green) 523; *In re Elliott's Will*, 25 Ky. (2 J. J. Marsh.) 340; *Monroe v. Barclay*, 17 Ohio St. 302, 93 Am. Dec. 620.) The existence of confidential relations between the testator and the one accused of exercising undue influence alone is not sufficient (*Mackall v. Mackall*, 135 U. S. 167, 34 L. Ed. 84, 10 Sup. Ct. Rep. 705); neither is the existence of opportunity (*Smith v. Smith*, 67 Vt. 443, 32 Atl. 255; *Riley v. Sherwood*, 144 Mo. 354, 45 S. W. 1077); nor suggestions made for the purpose of procuring testamentary disposition by fair persuasion or kind offices. (*McCulloch v. Campbell*, 49 Ark. 367, 5 S. W. 590; *Rogers v. Diamond*, 13 Ark. 475; *McDaniel v. Crosby*, 19 Ark. 533.) Neither is it sufficient that the testator was influenced by the beneficiary in the ordinary affairs of life, or that he was surrounded by the beneficiaries and in confidential relations with them, prior to and at the time of the execution of the will. (*McCulloch v. Campbell*, 49 Ark. 367, 5 S. W. 591; *Rutherford v. Morris*, 77 Ill. 397.) The result of undue influence, in order to invalidate a will, must be in effect to substitute the will of the person exercising the undue influence for that of the testator. (*Pennsylvania etc. Ins. Co. v. Union T. Co.*, 83 Fed. 896; *In re Kohler*, 79 Cal. 313, 21 Pac. 758; *Mackall v. Mackall*, 135 U. S. 167, 34 L. Ed. 84, 10 Sup. Ct. Rep. 705; *In re Calkins' Estate*, 112 Cal. 301, 144 Pac. 577.) The mere fact that the actions of the party did influence the testator is insufficient, unless the action included fraud, misrepresentation, coercion or some illegal and unlawful element of like character. (*In re Lyddy's Will*, 53

Hun, 629, 5 N. Y. Supp. 636; *In re McGraw's Will*, 9 App. Div. 372, 41 N. Y. Supp. 481.)

There is no allegation in the written contest that Mrs. Nett had anything to do with the preparation of the will, and there is no testimony in the record in any way tending to show that she did have. We therefore submit that the demurrer should have been sustained, and the contest held insufficient to raise any issue on the question of undue influence. (*In re Gharky*, 57 Cal. 274; *In re Sheppard's Estate*, 149 Cal. 219, 85 Pac. 312; *Ginter v. Ginter*, 79 Kan. 721, 22 L. R. A., n. s., 1024, 101 Pac. 636; *McCulloch v. Campbell*, 49 Ark. 367, 5 S. W. 591; *Schmidt v. Schmidt*, 201 Ill. 191, 66 N. E. 374; *Turner v. Gumbert*, 19 Idaho, 339, 114 Pac. 33; *Converse v. Mix*, 163 Wash. 318, 115 Pac. 305.)

The admission in evidence of the will of Mary Murphy and of the transfer of her property to the testator was error. The only question to be tried in the contest of a will is its validity, and the supreme court of the United States has announced that the manner in which a decedent acquired his title is wholly immaterial. (*Ormsby v. Webb*, 134 U. S. 47, 33 L. Ed. 805, 10 Sup. Ct. Rep. 478.)

The court erred in admitting in evidence the guardianship petition filed by Mrs. Nett, about four months after the will in question was executed. (*Entwistle v. Meikle*, 180 Ill. 9, 54 N. E. 217; *Wetzel v. Firebaugh*, 251 Ill. 190, 95 N. E. 1085; *Terry v. Buffington*, 11 Ga. 337, 56 Am. Dec. 423.)

The court permitted counsel for respondent over appellant's repeated objections to introduce in evidence certain declarations and admissions of Mrs. Nett (not made in the presence of either of the other beneficiaries under the will), as bearing upon the question of the mental capacity of the testator. The theory upon which such testimony is excluded on the question of mental competency is that it might defeat the will as to the other legatees who made no such admissions, and were not parties to the same. All legatees are jointly interested in the validity of the will, and under our law the will must be pro-

bated, if at all, as an entirety. Therefore, it would be the height of inequity to permit the admission of one legatee, to which the others were not parties, to defeat the will and deprive the other legatees of their rights thereunder. Such testimony is therefore inadmissible, either upon the question of mental competency or upon the question of undue influence. (*Eastis v. Montgomery*, 93 Ala. 293, 9 South. 311; *In re Dolbeer's Estate*, 153 Cal. 652, 15 Ann. Cas. 207, 96 Pac. 266; *Livingston's Appeal*, 63 Conn. 68, 26 Atl. 470; *Campbell v. Campbell*, 138 Ill. 612, 28 N. E. 1080; *Vannest v. Murphy*, 135 Iowa, 123, 112 N. W. 236; *Shailer v. Bumstead*, 99 Mass. 112; *O'Connor v. Madison*, 98 Mich. 183, 57 N. W. 105; *Teckenbrock v. McLaughlin*, 209 Mo. 533, 108 S. W. 46; *Carpenter v. Hatch*, 64 N. H. 573, 15 Atl. 219; *In re Myers' Will*, 184 N. Y. 54, 6 Ann. Cas. 26, 76 N. E. 920; *Linebarger v. Linebarger*, 143 N. C. 229, 10 Ann. Cas. 596, 55 S. E. 709; *Thompson v. Thompson*, 13 Ohio St. 356; *Nussear v. Arnold*, 13 Serg. & R. (Pa.) 323; *Helsley v. Moss*, 52 Tex. Civ. App. 57, 113 S. W. 599; *Forney v. Ferrell*, 4 W. Va. 729.)

Error in admitting evidence which tends to prejudice the mind of the jury is not cured by a direction in the charge of the court to the jury to disregard the evidence and by withdrawal of it from consideration. The instruction comes too late to cure the mistake. (*Throckmorton v. Holt*, 180 U. S. 552, 45 L. Ed. 663, 21 Sup. Ct. Rep. 474; *Erie v. Railroad Co.*, 125 Pa. 259, 11 Am. St. Rep. 895, 17 Atl. 443; *Gulf etc. R. R. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269; *Hamory v. Pennsylvania Ry. Co.*, 222 Pa. 631, 72 Atl. 227; *Nelson v. Spears*, 16 Mont. 351, 40 Pac. 786; *State v. Rees*, 40 Mont. 571, 107 Pac. 893.)

Respondent may not be heard to say or to claim before this court that the error in the admission of this testimony was harmless. Her attorneys introduced the testimony and insisted upon its admission, and she and they are now estopped from saying that such admission was harmless error. (*Lissak v.*

*Crocker Estate Co.*, 119 Cal. 442, 51 Pac. 688; *Smith v. Westersfield*, 88 Cal. 374, 26 Pac. 206.)

It is a well-settled rule, uniformly upheld by numerous adjudications, that it requires a less degree of mental capacity to make a will than to make a contract, or to transact ordinary business. (*Keely v. Moore*, 196 U. S. 38, 49 L. Ed. 376, 25 Sup. Ct. Rep. 169; *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882; *Dean v. Dean*, 42 Or. 290, 70 Pac. 1039; *Delafield v. Parish*, 25 N. Y. 9; *Bey's Succession*, 46 La. Ann. 773, 24 L. R. A. 577, 15 South. 297; *Greene v. Greene*, 145 Ill. 264, 33 N. E. 941; *Craig v. Southard*, 148 Ill. 37, 35 N. E. 361; *Keithley v. Stafford*, 126 Ill. 507, 18 N. E. 740; *Hanrahan v. O'Toole*, 139 Iowa, 229, 117 N. W. 675; *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33, 14 South. 685; *Kinne v. Kinne*, 9 Conn. 102, 21 Am. Dec. 732; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Wood v. Lane*, 102 Ga. 199, 29 S. E. 180; *Sinnet v. Bowman*, 151 Ill. 146, 37 N. E. 885; *Leeper v. Taylor*, 47 Ala. 221; *Southworth v. Southworth*, 173 Mo. 59, 73 S. W. 129; *Slaughter v. Heath*, 127 Ga. 747, 27 L. R. A., n. s., 1, 57 S. E. 69.)

The proponent is not required to do more than furnish rebutting proof, and if in the end the contestant has not sustained the burden, his contest must fail. This, too, is the general rule. (Beach on Wills, sec. 98; *Dolbeer's Estate*, 149 Cal. 227, 9 Ann. Cas. 795; 16 Current Law, p. 2615, note 58; *Council v. Mayhew*, 172 Ala. 295, 55 South. 314.)

The jury were told in instruction No. 7, in substance, that if they found habitual insanity prior to the making of the will, the burden of showing capacity at its execution shifted to the proponent. It is impossible to distinguish this instruction from that held erroneous in *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948. (See, also, *Carver v. Carver*, 97 Ind. 497, 511; *Heinemann v. Heard*, 62 N. Y. 448; *State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169.)

The evidence in this case is not sufficient to overthrow the will in question, under the rule laid down in *Dolbeer's Estate*, 149 Cal. 227, 9 Ann. Cas. 795, 86 Pac. 695; *Burley v. McGough*.

115 Ill. 11, 3 N. E. 739; *Treat v. Bates*, 27 Mich. 390; Jones on Evidence, 2d ed., secs. 390, 391.

*Messrs. Galen & Mettler*, for Respondent, submitted a brief; *Mr. Albert J. Galen* argued the cause orally.

It is argued that the allegation and proof as to the property of testator, and as to when and how he obtained it, were not property to be considered upon the hearing of the contest. We maintain that this proof was competent, not only as a part of the case of the contestant, as bearing upon the issue of undue influence, but also upon the issue of insanity. One of the tests by which the jury determines whether the testator was sane or insane at the time he made the will, is whether he comprehended, at the time of the execution of the will, the nature and extent of the property which was to be disposed of, and recollected the natural objects of his bounty. By the proof which was admitted of the transactions which finally culminated in Mrs. Murphy's divesting herself of all of her property in favor of her son, Edward J. Murphy, the jury might have concluded, and evidently did conclude, that Edward J. Murphy did not have in mind the nature and extent of his property, when he made his will, nor the natural object of his bounty. Any proof which will enlighten the jury upon these points is competent to be introduced upon the trial of a will contest upon the issue of testamentary capacity. (40 Cyc. 1004, notes 3, 4.) A wide range of inquiry is permitted into the life history of testator and the relations between the persons he dealt with. (*Barber's Exrs. v. Baldwin*, 138 Ky. 710, 128 S. W. 1092.) Evidence showing the financial condition of excluded relatives is admissible in a will contest. (*Rasdall v. Brush* (Ky.), 104 S. W. 749; *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596.) It is proper to prove on the issue of testamentary capacity the nature, extent and sources of testator's estate. (*Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405.) Evidence as to how testatrix came by her property is admissible in order to show possible motives actuating her in disposing of it. (*Floore v. Green* (Ky.), 83

S. W. 133.) The extent of testator's estate and his next of kin, and also the relations existing between the testator and any beneficiary under the will, may be shown as bearing upon the question of mental capacity. (*Spratt v. Spratt*, 76 Mich. 384, 43 N. W. 627.) On an issue of testamentary capacity contestant may show the manner in which deceased acquired the property disposed of by the will. (*In re Wilson's Estate*, 117 Cal. 262, 49 Pac. 172, 711.)

Declarations and admissions of Mrs. Nett: Counsel's argument upon this branch of the case is based upon the false assumption that there are other beneficiaries of the will of Edward J. Murphy besides Mrs. Nett. Declarations and admissions of a want of legal capacity can only be shown when made by a sole legatee under the will. (*Stull v. Stull*, 1 Neb. (Unof.) 389, 96 N. W. 196; *Ames v. Blades*, 51 Iowa, 596, 2 N. W. 408; *Renaud v. Pageot*, 102 Mich. 568, 61 N. W. 3; *Beyer v. Schlenker*, 150 Mo. App. 671, 131 S. W. 465.) "The conduct and declarations of those procuring a will by unlawful means, tending to show their purpose, are competent evidence on a will contest, unless other innocent devisees would be injured thereby." (2 Current Law, 2087, note 19.) It is competent to prove the declarations of a beneficiary tending to show confidential relations between himself and testator. (*Robinson v. Robinson*, 203 Pa. 400, 436, 53 Atl. 253.) The statements of the wife to whom the greater part of the estate was left, tending to show ill-will toward two sons disinherited, and to the effect that she would see to it that they should get no part of the testator's estate, are admissible. (*Powers v. Powers*, 25 Ky. Law Rep. 1468, 78 S. W. 152.) The statements of the husband of testatrix that he would see to it that contestants would receive nothing are admissible. (*Wall v. Dimmitt*, 24 Ky. Law Rep. 1749, 72 S. W. 300.)

Upon the proposition that a "less degree of mind is required to execute a will than a contract," we respectfully submit the following: "The capacity to make a valid will or to make a contract is precisely the same." (*Coleman v. Robertson's Exrs.*, 17 Ala. 84.) "The rule by which the capacity of a testator

is to be measured is whether at the time of executing or acknowledging his will, he was capable of executing a valid deed or contract." (*Davis v. Calvert*, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282; *Tyson v. Tyson*, 37 Md. 567, 582.) "The highest degree of mental soundness is required in order to constitute capacity to make a testamentary disposition, inasmuch as the act involves a larger and a wider survey of facts and things than is required in the other transactions of life." (*Boughton v. Knight*, L. R. 3 P. & D. 64; see, also, *Aubert v. Aubert*, 6 La. Ann. 104.)

In a will contest, in which there was evidence that testator was afflicted with senile dementia, and also evidence that senile dementia is not necessarily a settled condition of the mind, an instruction that it was presumable that the demented condition continued up to the time the will was made, so that the burden of proof was on proponents to show a lucid interval, was erroneous, the presumption of the continued existence of the unsoundness of mind only attaching when such unsoundness is shown to be a settled condition. (*In re Glass' Estate*, 127 Iowa, 646, 103 N. W. 1013.) All that contestant had to do in order to shift the burden was to show that on a date prior to the date of the execution of the will testatrix was suffering from a disease of the mind of a permanent, progressive nature, amounting to unsoundness. (*In re Jones' Estate*, 130 Iowa, 177, 106 N. W. 610.) If the contestant show that testator was affected with permanent insanity prior to the execution of the will, the burden of proving capacity is shifted to the proponent. (*Gesell v. Baugher*, 100 Md. 677, 60 Atl. 481.) Where there is shown a chronic imbecility preceding the execution of the will, its continuity is presumed, and the proponents of the will must prove an interval of competency. (*Von De Veld v. Judy*, 143 Mo. 348, 44 S. W. 1117; affirmed, 45 S. W. 1128.)

"Generally, the burden of showing that a will was procured by undue influence rests upon those who assert the fact; but when the contestants have made a *prima facie* case by the production of evidence, from which the presumption of undue in-



fluence arises, the burden is then upon the proponent to show that the instrument is the will of testator. It is not very material whether we say that in such a case the burden shifts, or that the evidence produced, aided by the presumption which arises therefrom, is evidence sufficient to make a *prima facie* case. What is meant is that a point is reached when the contestant prevails, unless the proponent assumes the obligations of going forward with his evidence." (*In re Tyner's Estate*, 97 Minn. 181, 106 N. W. 898.)

MR. JUSTICE SANNER delivered the opinion of the court.

Edward J. Murphy died on November 27, 1909, leaving an estate worth approximately \$30,000, and one heir at law, his mother, Mary Murphy, the respondent on this appeal. His other near relatives are a full sister, Anna E. Nett, the appellant here, and two brothers and three sisters of the half blood. An instrument purporting to be his last will and testament, executed December 12, 1908, was offered by the appellant for probate, and its right to be received and regarded as his last will and testament is contested by the respondent, upon the grounds that at the time of its execution the testator lacked testamentary capacity, and was acting under undue influence of the appellant. By the terms of this will one dollar was given to each of the half brothers and sisters, and the balance of his property was left to appellant, on condition that she should, out of the property, support and care for the respondent during the remainder of respondent's life.

This is the second appeal in this matter. On the former appeal (see *In re Murphy's Estate*, 43 Mont. 353, Ann. Cas. 1912C, 380, 116 Pac. 1004), the judgment in favor of respondent was reversed, and the cause remanded for a new trial on account of certain errors in the instructions. The case was retried, and the jury found for the respondent upon the issue of testamentary capacity. This appeal is from an order denying appellant's motion for a new trial.

1. The respondent suggests that this appeal ought not to be considered, because an appeal was taken from the judgment herein and dismissed on motion of respondent, and because the appellant has, by failure to discuss it, abandoned specification No. 3, which claims error in the overruling of the motion for new trial. Concerning the appeal from the judgment, the argument is [1] that by its dismissal the judgment was affirmed and became final, and cannot now be undermined by a reversal of the order overruling the motion for new trial. In *Molt v. Northern Pac. Ry. Co.*, 44 Mont. 471, 120 Pac. 809, we considered some of the difficulties incident to our present appellate procedure; and it is a necessary consequence from what is there said that, where separate appeals, permissible under the statute, are taken in the same case, the fate of one is not necessarily involved in the fate of the other. Nor is there any merit in the supposed abandonment of specification No. 3. While we do not find in appellant's brief any discussion of specification No. 3 *eo nomine*, the entire brief reads like an argument devoted to the theme that the motion for a new trial should have been sustained.

2. It is contended that the allegations of undue influence, as set forth in the amended statement of contest, were insufficient, and that the trial court erred in not eliminating this subject from the case. Doubt may be entertained as to whether this matter was ever properly raised in the district court; but, assuming it to be properly before this court, it presents two aspects: As affecting the integrity of the judgment, and as furnishing a basis for the introduction of evidence. As regards the integrity of the judgment, the question is purely academic, because [2] there was no finding of undue influence. There were sufficient allegations in the amended statement of testamentary incapacity, and upon that only was there any finding by the jury. Since this finding is the sole support of the judgment, it cannot matter to the judgment what may be the deficiency in the allegations relating to undue influence. (*In re Murphy's Estate*, *supra*.) Vigorous language is employed, however, to convince us that, if the subject of undue influence had been eliminated

from the pleadings, no testimony could have been received upon it; and that, inasmuch as a great part of the record consists of such testimony, clearly creative of prejudice in the ordinary mind, its effect in producing the finding upon the other issue must be manifest, and this court should send the case back for a new trial. There is enough merit in this to warrant a determination of the question raised.

"Undue influence," as applied to cases of wills, has been variously defined. In the former appeal of this case it was stated to be such as "imposes a restraint on the will of the testator, who, but for the restraint, would be free and responsible, so that his testamentary act is not the result of his own volition, but the will of another"; and this, in connection with our statute (Rev. Codes, sec. 4981), is sufficient for all practical purposes. The theory underlying the doctrine of undue influence is that the testator is induced, by the means employed, to execute an instrument in form and appearance his will, but in reality expressing testamentary dispositions which he would not have voluntarily made. (40 Cyc. 1146; Page on Wills, sec. 126, p. 145.) To defeat a will, the undue influence must have been directed toward the particular testamentary act and at the time thereof, or so near thereto as to be operative. (40 Cyc. 1145; Page on Wills, sec. 130, p. 151.) As such influence is [3] seldom exercised openly, it cannot be expected that a pleading should specify with particularity the entire details of the manner in which it was used. If ultimate facts are alleged from which the legal conclusion of undue influence fairly follows, it is sufficient to support proof. (*Estate of Gharkey*, 57 Cal. 274; *Sheppard's Estate*, 149 Cal. 219, 85 Pac. 312.)

Now, as constituting undue influence, the amended statement at bar alleges that when the will was made, the decedent was, and for a long time prior thereto had been, so afflicted with disease of the body and mind that he was unable to properly take care of himself, and was in constant need of the care and attention of some other person, and became so weakened in mind and body and reasoning faculties that he was easily influenced

by those under whose care and into whose custody he came; that during all such time appellant acted as guardian and custodian of his person and property, was almost constantly with him, and he was entirely dependent on her for the care and attention of which he stood in need; that as a patient he was constantly in charge of physicians and nurses selected and employed by her; that by reason of all these things she acquired and had, at the time the will was made, a great and controlling influence over his mind and will, and was able to and did direct and dictate to him what he should do in matters pertaining to his property; that, "taking a grossly oppressive and unfair advantage of his necessities and distress of mind and body," she did, many times before the will was made, "demand and importune of him that he leave all his property by will to her, to the exclusion of all his other relatives, and particularly to the exclusion of his mother, the contestant herein"; that by reason of such demands and importunities she did so prevail upon and influence him in his then weakened condition of mind and body at the time the will was made that he did, against his will and wish, "in form execute the said purported will," but said will was not his free or voluntary act, and, had he been free from the said undue influence of appellant, he would not have made the will in question.

"Demands and importunities," it is said, are all that is here [4] alleged, and as demands and importunities may be entirely proper, they cannot alone support the charge of undue influence. We think that counsel unduly restrict the effect of respondent's allegations by ignoring the circumstances. In a case involving undue influence the question is not what effect the supposed influence would have had upon an ordinarily strong and intelligent person, but its effect upon the person on whom it was exerted, taking into consideration the time, the place and all the surrounding circumstances. (Page on Wills, sec. 126, p. 146; *Mooney v. Olsen*, 22 Kan. 69; *Gurley v. Park*, 135 Ind. 440, 35 N. E. 279; *Griffith v. Diffenderffer*, 50 Md. 466; *Shailer v. Bumstead*, 99 Mass. 112; *Rollwagen v. Rollwagen*, 63 N. Y.

504.) To say that demands and importunities can in no case amount to undue influence, unless coupled with fraud, threats or misrepresentation, is to misapprehend the purport of our statute and to beg the question. Whether they do or do not depends upon what they are, how persistently and under what circumstances they are employed, and whether the mind of the testator is so infirm as to be overpowered by them. It is here charged that the demands and importunities in question were of a certain peculiar character, were plied by a person standing in a certain special and controlling relation to the testator, at a certain period of time when, by reason of mental weakness, he was unable to resist, and that they caused him to do what he did not want to do, and would not have done if left alone. While we do not acclaim the pleading before us as a model, we think that, under such circumstances as are detailed, it is quite possible for demands and importunities to amount to undue influence, without actual fraud, menace or misrepresentation (*Hacken v. Newborn*, Style, 427; *Hall v. Hall*, L. R. 1 Prob. Div. 481; *Wingrove v. Wingrove*, L. R. 11 Prob. Div. 81; *Roman Catholic Episcopal Corp. v. O'Connor*, 14 Ontario L. R. 666; *Higginbotham v. Higginbotham*, 106 Ala. 314, 17 South. 516; *Barlow v. Waters* (Ky.), 28 S. W. 785; *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314; *Lehman v. Lindenmeyer*, 48 Colo. 305, 109 Pac. 956); and therefore the pleading was sufficient as a basis for the introduction of evidence upon this subject.

3. Complaint is made of the denial of appellant's motion to strike paragraphs 6 and 7 from the amended statement, and of [5] the admission in evidence of the facts that in 1901 respondent made a will leaving all of her property to the decedent, and that in 1906 she made a transfer by deed and bills of sale of all her real and personal property to him. If these facts were admissible in evidence on any theory, then we need not inquire whether error occurred in the refusal to strike the allegation of them from the pleading, because it could have had no prejudicial effect. As to the facts themselves, while they

may appear remote and the deduction from them far-fetched, it cannot be said, as a matter of law, that they were not admissible on any theory. Indeed, appellant's counsel, on page 79 of their brief, seem to concede that such evidence might be competent if it were made to appear that, in pursuance of a purpose to secure all this property through undue influence upon the decedent, she had induced the respondent to make the will and transfer; and this is precisely what the pleading attempts to say. But independently of that the evidence was admissible. While the injustice or unreasonableness of a will is never alone sufficient to cause its rejection, it is always a circumstance bearing upon testamentary capacity and upon undue influence. (*In re Wilson's Estate*, 117 Cal. 262, 49 Pac. 172; *Sim v. Russell*, 90 Iowa, 656, 57 N. W. 601.) That his mother had willed and later had transferred to the decedent all her property, and that he knew these things before his will was made, were facts illustrating the reasonableness of his will, his realization of the extent and character of his property, and his ability to appreciate the special claims she had thereby created upon him. (*Pergason v. Etcherson*, 91 Ga. 785, 18 S. E. 29; *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405; *Floore v. Green* (Ky.), 83 S. W. 133; *Lehman v. Lindenmeyer*, *supra*; *In re Ruffino's Estate*, 116 Cal. 304, 48 Pac. 127; *Gunn's Appeal*, 63 Conn. 254, 27 Atl. 1113; *Glover v. Hayden*, 4 Cush. (Mass.) 580.)

4. Upon the trial a motion by appellant to strike certain [6] testimony given by Mrs. Murphy touching her manner of living was denied. The court could very well have stricken this testimony, for it was manifestly improper and could serve no legal purpose. But error cannot be claimed because the evidence was evoked in response to five separate interrogatories, none of which were objected to. This court has repeatedly held that a party may not sit by in silence while objectionable questions are being asked and answered, and then complain because the record is not cleared on his motion to strike. (*Cohen v. Clark*, 44 Mont. 151, 119 Pac. 775.)

5. Over the objection of appellant "that one legatee or beneficiary of the will is not competent to make admissions affecting the validity of the will, so far as the sanity or insanity of the testator is concerned," certain statements, claimed to have been made by her, were admitted as declarations against interest. It is not necessary to state them in detail, because we think they were all admissible as against the objection made. It is elementary that upon a trial evidence may be given of the act, declaration or admission of a party as evidence against such party. (Rev. Codes, sec. 7887.) Doubtless, in will contests this rule is to be considered as modified by another: That, where [7] there are two or more legatees or beneficiaries under the will having a common or several, but not joint, interest in its provisions, the declarations of one of them as to testamentary capacity or undue influence are inadmissible to affect its validity, because the will cannot be defeated as to such legatee without being defeated as to all. (*Wood v. Carpenter*, 166 Mo. 465, 66 S. W. 172; *McConnell v. Wildes*, 153 Mass. 487, 26 N. E. 1115; *Shailer v. Bumstead*, *supra*; *Fothergill v. Fothergill*, 129 Iowa, 93, 105 N. W. 377; *Campbell v. Campbell*, 138 Ill. 612, 28 N. E. 1080; *In re Snowball's Estate*, 157 Cal. 301, 107 Pac. 598; *In re Myer's Will*, 184 N. Y. 54, 6 Ann. Cas. 26, 76 N. E. 920; *In re Dolbeer's Estate*, 153 Cal. 652, 15 Ann. Cas. 207, 96 Pac. 266.) But this case affords no occasion to apply the modification, because there is no one to be adversely affected by avoiding the will, save appellant herself. As to the brothers and sisters who are mere nominal legatees, recipients of a sum established by custom as a polite mode of disinheritance, it is a case where the law does not care for trifles. The real parties in interest are two, the appellant and the respondent; one, the sole substantial devisee under the will, offering it for probate; the other, sole heir at law, resisting probate. Under such circumstances the declarations or admissions of the devisee, if otherwise competent, ought to be, and are, admissible. (*Egbers v. Egbers*, 177 Ill. 82, 52 N. E. 285; *Teckenbrock v. McLaughlin*, 209 Mo. 533, 108 S. W. 46; *In re Myer's Will*, *supra*;

*Stull v. Stull*, 1 Neb. (Unof.) 389, 96 N. W. 196; *Beyer v. Schlenker*, 150 Mo. App. 671, 131 S. W. 465; *Wallis v. Luhring*, 134 Ind. 447, 34 N. E. 231; *Perret v. Perret*, 184 Pa. 131, 39 Atl. 33.) By instruction 21 the court sought to limit the jury, in their consideration of these declarations, to the question of undue influence; if there was any error in this, appellant cannot [8] complain, as it was to her advantage.

6. Two physicians, called in rebuttal as insanity experts, were [9] permitted to testify that, in their opinion, the testator could not have had a lucid interval when the will was made. Counsel for appellant say that this was the same as permitting the doctors to decide the very question before the jury, whether the testator was capable of making a will, and approved authority is cited to show that the province of the jury may not be thus invaded. We assent to the rule invoked, but not to its application. The decedent was shown to have been insane before December 1, 1908, and after Christmas of that year. He died the following year of dementia, which is the terminal stage of insanity in many of its forms, and a controversy had developed as to the nature of this insanity. It was the contention of the appellant that on December 12, 1908, the decedent was sane, was enjoying a lucid interval, and this, supported by formidable evidence, was consistent with the nature of his disease as asserted by her medical witnesses. For the opposition it was sturdily maintained that the disease was paresis, a general, progressive, permanent, incurable condition admitting no such thing as a lucid interval; if this were true, then the questions asked were but another way of emphasizing the respondent's contention as to the nature of the disease, and of inquiring whether the testator was of sound mind when the will was made. So considered, the question was within the scope of expert testimony.

7. Error is assigned upon the refusal of certain instructions and the giving of certain others. Appellant's offered instruction No. 5 was properly refused. It charged the rule to be that a less [10] degree of mind is required to execute a will than a con-



tract, etc., and many decisions are cited to show that this is good law, and should have been given to the jury. Respondent's counsel, on the other hand, present authorities which hold that the capacity to make a valid will or to make a contract is precisely the same, and that was the ground of their objection to the instruction. With all due respect to these learned decisions, we think that in such matters comparisons are odious, and, for purposes of instructing the jury, wholly unnecessary. To make a will or contract implies more than merely signing it, and it contravenes human experience to say that the conception, ordering and comprehension of a will dispensing, with care and precision, extensive property, involving, it may be, charities and trusts of various kinds, requires less capacity than the purchase of a bar of soap; or that the same intellectual capacity is required for the simple holograph, "I leave all my property to my wife," and for the elaboration of a complex trade agreement designed to accomplish far-reaching results. The conclusion of common sense is that it takes more mind to make some wills than to make some contracts, and *vice versa*; and there is excellent authority for the rule that, while contractual capacity implies *prima facie* the capacity to make a will, yet neither is a test for the other, and the presence or absence of one does not conclusively establish the presence or absence of the other. (Page on Wills, sec. 96; *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310; *Brown v. Mitchell*, 88 Tex. 350, 36 L. R. A. 64, 31 S. W. 621; *Segur's Will*, 71 Vt. 224, 44 Atl. 342; *American Bible Society v. Price*, 115 Ill. 623, 5 N. E. 126; *Greene v. Greene*, 145 Ill. 264, 33 N. E. 941.)

Appellant's offered instruction No. 7 was substantially covered by the given instructions Nos. 6 and 8. The court's instruction No. 7 is attacked as assuming the testator's insanity, and as imposing upon the appellant a greater burden than properly belongs to her. Upon first reading this seems to be the case; but carefully read, and taken in connection with the other instructions, we do not think that No. 7 could have been so misleading or fruitful of prejudice to the appellant as to require a reversal of this case.

8. An exception appears to the ruling admitting certain testimony of the witness Taylor. This testimony was given on re-direct examination, and he was entitled, after the plight in which the cross-examination had put him, to explain himself as best he could.

9. Upon the former appeal this court entered into a somewhat extended discussion of the evidence presented to show testamentary incapacity; with the result that, while it was characterized as "not as satisfactory as it might be," it was still held sufficient. There is nothing in the present record to require a change in either the characterization or the conclusion. There was ample evidence to sustain the will, and there was substantial [11] evidence against it. Under such circumstances we may not substitute our judgment for that of the judge and jury who tried the issue and had the advantage of personal observation of the witnesses. (*In re Noyes' Estate*, 40 Mont. 178, 105 Pac. 1013; *In re Murphy's Estate*, *supra*; *In re Wilson's Estate*, *supra*.) So, also, as regards the submission to the jury of the issue of undue influence. Taken at its utmost inferential value, the evidence on this subject was sufficient to warrant the action of the court.

There is no reversible error in the record, and the order appealed from is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

HULSE, RESPONDENT, v. NORTHERN PACIFIC RY. CO.  
ET AL., APPELLANTS.

(No. 3,197.)

(Submitted February 11, 1913. Decided February 20, 1913.)

[130 Pac. 415.]

*Personal Injuries—Railroads—Trespassers—Evidence—Self-serving Declarations—Admissibility—New Trial Order—Affirmance, When.*

Appeal—New Trial Order—Affirmance, When.

1. An order granting a new trial asked for on the ground of errors of law occurring at the trial will be affirmed if it appear that any such errors of a substantial character were committed.

Personal Injuries—Railroads—Trespassers—Self-serving Declarations—Inadmissibility.

2. Self-serving declarations of plaintiff in an action for personal injuries sustained in being run over by a freight train on which he was riding without paying fare, to the effect that he had been pushed off by a brakeman, *held*, not part of the *res gestae* but mere narratives of a past transaction, and therefore properly excluded.

Same—Self-serving Declarations—Rebuttal—Admissibility.

3. Defendant's witnesses having testified to a remark made by plaintiff soon after the accident, to the effect that someone had pushed him off the car, but that he did not say that a brakeman had done so, rebuttal testimony that he had made the latter statement was improperly excluded; it was admissible under section 7871, Revised Codes, even though the declaration thus made by him was self-serving.

*Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.*

ACTION by A. J. Hulse against the Northern Pacific Railway Company and another. From an order granting plaintiff a new trial defendants appeal. Affirmed.

*Messrs. Gunn & Rasch*, for Appellants, submitted a brief; *Mr. Carl Rasch* argued the cause orally.

To permit statements, not otherwise admissible, to be given in evidence under the rule expressed in section 7871, Revised Codes, that when part of a conversation is given in evidence by one party, the whole on the same subject may be inquired into by the other, and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversa-

tion or writing, which is necessary to make it understood, may also be given in evidence, it must not only be made to appear that statements claimed to have been made are necessary in order that that part which has been introduced may be understood, but it must also be made to appear that they were a part of the same conversation to which other witnesses had testified and made at the same time. And the burden of showing this is upon the party seeking the admission of such statements. (*Platner v. Platner*, 78 N. Y. 90; *In re Chamberlain*, 140 N. Y. 390, 37 Am. St. Rep. 568, 35 N. E. 602; *Dean v. Dean's Estate*, 43 Vt. 337; *Robinson v. Ferry*, 11 Conn. 460; 3 Wigmore on Evidence, par. 2113, subd. b; 1 Encyclopedia of Evidence, 385, 386; 16 Cyc. 1040, 1041.) In the case of *Downs v. New York Cent. R. R. Co.*, 47 N. Y. 83, the facts are very similar to those in the case at bar. Evidence had been introduced with reference to statements made by the plaintiff at the time of and soon after the accident as to the cause of his injuries, and for the purpose of rebutting the testimony so given on behalf of the defendant, the trial court, over the objection of the defendant, permitted a witness to be called in rebuttal to testify to statements made by the plaintiff at the time, differing, to some extent, from those testified to by the witnesses for the defendant. The appellate court held that error had been committed in that regard, and reversed the judgment. (See, also, *Nutter v. O'Donnell*, 6 Colo. 253; *O'Connor v. Padget*, 82 Neb. 95, 116 N. W. 1131; *Hatch v. Potter*, 7 Ill. (2 Gill) 725, 43 Am. Dec. 88; *Johnson v. Brock*, 23 Ark. 282.)

*Mr. Wellington D. Rankin* submitted a brief in behalf of Respondent and argued the cause orally.

The testimony relative to the statements made by plaintiff as to how he was injured and who pushed him off the train was improperly excluded. (See *Fidelity etc. Co. v. Dorrough*, 107 Fed. 389, 46 C. C. A. 364; *McGuire v. Broadway etc. Ry. Co.*, 62 Hun, 623, 16 N. Y. Supp. 922; *Horne v. McRae*, 53 S. C. 51, 30 S. E. 701; *Wells v. Gallagher*, 144 Ala. 363, 110 Am.

St. Rep. 50, 3 L. R. A., n. s., 759, 39 South. 747; *Rouse v. Detroit Elec. Ry. Co.*, 128 Mich. 149, 87 N. W. 68; *Droege v. Baxter*, 77 App. Div. 78, 79 N. Y. Supp. 29; *Gilpin v. Gilpin*, 12 Colo. 504, 21 Pac. 612; *Williams v. Spokane*, 42 Wash. 597, 84 Pac. 1129; *Conover v. Neher-Ross Co.*, 38 Wash. 172, 107 Am. St. Rep. 841, 80 Pac. 283; *St. Louis etc. Ry. Co. v. Frazier* (Tex. Civ. App.), 87 S. W. 400; 16 Cyc. 1039.)

The statements and declarations of the plaintiff sought to be elicited from the witness Matheny by plaintiff's various offers of proof, to the effect that a brakeman pushed him off the train, made when the switch engine came to get him at the place where he was injured, should have been admitted in evidence as a part of the *res gestae*. (*Dixon v. Northern Pac. Ry. Co.*, 37 Wash. 310, 107 Am. St. Rep. 810, 2 Ann. Cas. 620, 68 L. R. A. 895, 79 Pac. 943.)

In the case of *Travelers' Ins. Co. v. Mosley*, 8 Wall. (U. S.) 397, 19 L. Ed. 437, it is said: "The tendency of modern adjudications is to extend rather than to narrow the scope of this doctrine; rightly guarded, in its practical application there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority." Contemporaneousness is no longer required. (16 Cyc. 1248; see, also, *Lewis v. State*, 29 Tex. App. 201, 25 Am. St. Rep. 720, 15 S. W. 642; *Johnson v. State*, 8 Wyo. 494, 58 Pac. 761; *Harriman v. Stowe*, 57 Mo. 93.) It seems that the question whether a statement or declaration is a part of the *res gestae* is within the judicial discretion of the trial court. (*Pilkinton v. Gulf etc. Ry. Co.*, 70 Tex. 226, 7 S. W. 805; *Pledger v. C. B. & Q. Ry. Co.*, 69 Neb. 456, 95 N. W. 1057; *Commonwealth v. McPike*, 57 Mass. (3 Cush.) 181, 50 Am. Dec. 727; 16 Cyc. 1250.) The whole matter of the admissibility of the declarations sought to be elicited from the witnesses Grotz and Matheny being within the discretion of the trial judge, it is proper for this court to assume that a judicial discretion was exercised, and that the trial court determined that the declaration alleged to be part of the *res gestae* should have been admitted in evidence.

The cases cited by counsel for appellants are all cases where the conversations were distinctly different conversations, and of course it is necessary that the conversation be the same in order that the testimony should be introduced explaining the prior conversation.

MR. JUSTICE SANNER delivered the opinion of the court.

On March 21, 1911, the respondent, A. J. Hulse, with others, was riding on one of appellant company's freight trains en route from Missoula to Helena without paying fare. When the train had reached a point about half a mile west of Helena he was in some manner cast beneath its wheels and run over, sustaining the injury which is the basis of this action. The issue of fact was whether he had been pushed off by the brakeman while the train was in motion. The case was tried to the district court sitting with a jury, and the verdict was for the appellant. On motion of respondent the verdict was set aside and a new trial awarded; hence this appeal.

The motion for new trial was submitted to the district court [1] upon the ground of errors of law occurring at the trial. If it appear that any such errors of a substantial character were committed, the order must be affirmed. (*Monson v. La France Copper Co.*, 43 Mont. 65, 114 Pac. 778; *Harrington v. Butte etc. Ry. Co.*, 36 Mont. 478, 93 Pac. 640; *Gillies v. Clarke Fork Coal Co.*, 32 Mont. 520, 80 Pac. 370; *State v. Schnepel*, 23 Mont. 523, 59 Pac. 927.)

The exceptions noted in the record challenge the propriety of the rulings below in two respects: (1) The exclusion from respondent's case in chief of certain declarations by him, to the effect that the brakeman had pushed him off; and (2) the exclusion of substantially the same evidence in rebuttal.

1. The declarations were self-serving, and the theory on which [2] it was sought to have them admitted in chief is that they were part of the *res gestae*. To this we cannot assent. Without elaboration, it will suffice to say that the declarations in question were merely statements or narratives of a past trans-

action and within the rule against hearsay. (*State v. De Hart*, 38 Mont. 211, 99 Pac. 438; *Poindexter & Orr L. St. Co. v. Oregon Short Line Ry. Co.*, 33 Mont. 338, 83 Pac. 886; *State v. Tighe*, 27 Mont. 327, 71 Pac. 3; *State v. Pugh*, 16 Mont. 343, 40 Pac. 861.) The order granting a new trial cannot be sustained for error in this regard.

2. In rebuttal it was sought to prove by the witnesses Matheny, Grotz and Ward that respondent said a brakeman had pushed him off. As to Matheny, the evidence was properly refused, since the declaration to be elicited from him was fixed at a time and place for which there was no foundation in the appellant's case. [3] As to Grotz and Ward, the condition is different. For the appellant the witnesses Porter, Gardiner and Wilson had testified to the effect that, after respondent had been taken to the baggage-room, some conversation occurred in which the respondent stated in effect that, as the train was coming into town and as he was getting out of the car, some one of his companions in the car pushed him and he fell. On cross-examination Porter further testified that the respondent did not say a brakeman pushed him off; and Gardiner and Wilson testified that the respondent did not say who pushed him. We are satisfied that there was but one conversation in the baggage-room. The testimony of Grotz and Ward, therefore, was admissible as part of that conversation (Rev. Codes, sec. 7871; 1 Ency. of Evidence, p. 385), and as a contradictory version of it. (*Fidelity & Casualty Co. v. Dorrough*, 107 Fed. 389, 46 C. C. A. 364; *Carver v. United States*, 164 U. S. 694, 41 L. Ed. 602; 17 Sup. Ct. Rep. 228; *O'Keefe v. Eighth Ave. R. Co.*, 33 App. Div. 324, 53 N. Y. Supp. 940; *St. Louis etc. Co. v. Frazier* (Tex. Civ. App.), 87 S. W. 400.) The way for it having been opened in appellant's case, its admissibility in rebuttal was not affected by the fact that the declaration was self-serving.

The trial court was in better position to appreciate the value of this testimony than we are. In view of what appears in the record, it does not seem to have been of very much importance; but its exclusion was error, and we cannot say that the trial

court was guilty of a graver error in the effort to correct it.

The order appealed from is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

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LOWERY ET AL., RESPONDENTS, v. COLE ET AL., APPELLANTS.

(No. 3,285.)

(Submitted February 10, 1913. Decided February 21, 1913.)

[130 Pac. 410.]

*Specific Performance—Injunctions Pendente Lite—Complaint—  
Sufficiency—Real Property—Tender of Deed—Action at Law  
—Compensation—Presumptions.*

**Preliminary Injunctions—Discretion—Appeal.**

1. The granting of, or refusal to grant, a preliminary injunction, with or without notice, as well as the continuing thereof in force after answer, are matters addressed to the discretion of the district court, with the exercise of which the supreme court will interfere only in case of manifest abuse.

**Specific Performance—Complaint—Sufficiency—Injunction Pendente Lite.**

2. The fact that the complaint seeking specific performance of a contract, under the terms of which defendant agreed *inter alia* to take over certain lots owned by plaintiffs in discharge of a judgment held by her, and asking a preliminary injunction restraining conduct on defendant's part which, but for the restraint, would result in a condition rendering a final decree in favor of plaintiffs ineffective, failed to allege that defendant was insolvent, did not render the court's action in granting the injunction erroneous; the pleading having been verified upon knowledge, the requirements of section 6644, Revised Codes, were met.

**Same—Sale of Realty—Deed—Tender—Complaint—Sufficiency.**

3. In an action to enforce the specific performance of the contract referred to in paragraph 2, *supra*, failure on the part of plaintiffs to tender the deed with the complaint did not render the pleading objectionable, it having been alleged that an offer to perform had been made and refused and that plaintiffs were willing and stood ready to comply with the contract on their part.

**Same—Complaint—Sufficiency—Compensation—Presumptions.**

4. In an action for the specific performance of a contract for the sale of real property it is not necessary for plaintiff to allege that he has no adequate remedy at law, the presumption attaching that he has suffered detriment which is incapable of compensation in damages.



**Same—Injunctions—Power of Court.**

5. A court of equity, having once assumed jurisdiction of an action for specific performance for the sale of land, may, as in any other action, make use of all the instrumentalities at its disposal, including injunction, to preserve the *status quo* until the controversy can be determined on the merits.

*Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.*

ACTION by Andrew Lowery and another against Mary Cole and George See, sheriff. From an order refusing to dissolve an injunction defendants appeal. Affirmed.

*Messrs. O'Hara, Edwards & Madeen*, for Appellants, submitted a brief; and *Mr. Thomas J. Edwards* argued the cause orally.

*Mr. James D. Taylor*, and *Mr. L. O. Johnson*, for Respondents, submitted a brief; *Mr. Taylor* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Appeal from an order refusing to dissolve an injunction. On January 20, 1912, the plaintiffs were indebted to the defendant Mary Cole in the sum of \$949.44, evidenced by a judgment recovered in the district court of Ravalli county on September 2, 1911. They were also indebted to one Louise J. Hageman. A portion of this indebtedness, the exact amount being not then definitely determined, was secured by a mortgage upon lots 15 and 16, in block 21, in Hamilton, Ravalli county. The plaintiffs, desiring to effect satisfaction of the judgment and also to procure a discharge of so much of their indebtedness to Hageman as was secured by the mortgage, entered into a contract in writing with the defendant Cole, under the terms of which they agreed to convey to her the said lots by warranty deed at a price to be fixed by three arbitrators, one chosen by each of the parties to the contract, and the third by these two. The defendant Cole agreed on her part to accept the conveyance at the

price so to be fixed, and in consideration therefor (1) to pay so much of the Hageman indebtedness as was secured by the mortgage; (2) to apply the remainder to the satisfaction of the judgment; and (3) to pay the balance, if any then remaining, to the plaintiffs. The arbitrators were selected and fixed the price of the lots at \$1,750. The amount of the Hageman encumbrance was then definitely ascertained to be \$778. In addition to these facts, the complaint alleges that the plaintiffs thereupon executed a warranty deed to defendant Cole; that they tendered it to her and demanded that she pay the mortgage indebtedness due Hageman; that she refused to accept the deed or to pay the said indebtedness and has ever since refused to do so; that the plaintiffs have ever since been ready to deliver the said lots to this defendant according to the terms of the contract; that on the — day of —, 1912, this defendant caused an execution to be issued upon the judgment and to be placed in the hands of the defendant George See, the sheriff of Ravalli county; that, under and by virtue of it, he has seized certain personal property of plaintiffs, consisting of livestock, hay, grain, farming implements, household goods, *etc.*; that he has advertised it for sale to satisfy the judgment; and that, unless he is restrained from so doing, he will proceed to complete the sale and satisfy the judgment. It is further alleged, by way of conclusion, that the plaintiffs are without a plain, speedy or adequate remedy at law, and will suffer irreparable damage if the sale is carried to completion. The prayer is for a decree requiring the defendant Cole to perform the contract according to its terms, and for an injunction to restrain the sale pending the action. Attached as an exhibit is a copy of the contract. The allegations are upon positive knowledge. The complaint was filed on November 8. The court issued the injunction as prayed, but without notice, the sale being advertised for that day. On December 6 the defendants moved the court to vacate the order granting the injunction on the grounds that the facts stated do not warrant the granting of the writ, and that, in any event, they do not exhibit such an emergency as justified the granting of it with-

out notice. The motion was supported by an affidavit by the defendant See, and by an answer by both defendants. The affidavit does not controvert any of the facts alleged in the complaint. The answer admits all of the allegations therein made, except that it denies a tender of the deed by the plaintiffs. It alleges in this connection that the defendant Cole, at the time the value of the lots was fixed by the arbitrators, was, and ever since has been, ready and willing to accept the deed from plaintiffs and to carry out the terms of the contract, but that the plaintiffs refused, and ever since have refused, to deliver it or the possession of the lots.

It is a settled rule in this jurisdiction that the granting or [1] refusing to grant a preliminary injunction in a particular case rests in the discretion of the district court, and that this court will not interfere with the exercise of that discretion unless there has been a manifest abuse of it. (*Bennett Bros. v. Congdon*, 20 Mont. 208, 50 Pac. 556; *Boyd v. Desrozier*, 20 Mont. 444, 52 Pac. 53; *Forrester v. Boston & Mont. etc. Co.*, 21 Mont. 544, 55 Pac. 229, 353.) In exigent cases, before the defendant has answered, the writ may be granted without notice either upon the complaint alone or upon affidavits, if in the opinion of the court irreparable injury will result from the delay required for giving notice. (Rev. Codes, secs. 6644, 6645.) So it is discretionary with the court as to whether the injunction shall be continued after the defendant has answered.

The contention of counsel is that since it is not alleged that [2] the defendants are insolvent, and it is apparent that an action at law for damages for a violation of the contract would adequately compensate the plaintiffs, the court abused its discretion both in granting the writ, and in refusing to sustain the motion to set it aside. There is no merit in the contention from either point of view. The complaint is verified upon knowledge. This meets the requirement of the statute. (Sec. 6644, *supra*.) We do not think that it can be questioned that the plaintiffs are entitled to a specific performance of the contract, if the facts as stated are established by the evidence. The complaint

is not a model of pleading, but it sets forth clearly the stipulations of the contract, the definite ascertainment of the purchase price in accordance therewith, and a tender of such a conveyance as the plaintiffs bound themselves to make. But for the single issue as to the tender of the deed, upon the admissions in the answer it is apparent that defendant Cole is without defense.

[3] It is true the deed is not tendered with the complaint; yet, since the plaintiffs have submitted themselves to the jurisdiction of the court, they may be required to prepare and deposit the deed in court at any time before the decree granting them relief. By demanding the relief sought, coupled with the allegation of the offer to perform, they exhibit their willingness to meet all the obligations to be performed on their part. Hence the complaint is not open to objection because the plaintiffs do not allege a deposit of the deed with the clerk. As was said by the supreme court of appeals of West Virginia, in *Vaught v. Cain*, 31 W. Va. 424, 7 S. E. 9: "Whatever may be the rule as to dependent covenants in courts of law, it is well settled, in cases of this character in courts of equity, that it will not make the bill demurrable merely because the plaintiff fails to tender with his bill for specific performance a sufficient or any deed for the land." There is some diversity in the decisions on the subject, but, where it appears that an offer to perform has been made and refused, it is sufficient if the plaintiff alleges that he is willing and stands ready to comply with the contract on his part. (*Bruce v. Tilson*, 25 N. Y. 194.)

In this character of action it is not necessary for plaintiff [4] to allege special circumstances showing that he has no adequate remedy at law. The allegation of a breach of such a contract is itself sufficient to raise the presumption that pecuniary compensation will not afford adequate relief. (*Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695; *Christiansen v. Aldrich*, 30 Mont. 446, 76 Pac. 1007; Rev. Codes, sec. 6099.) In other words, when it appears that the defendant has refused to comply with his contract, the presumption attaches that the plaintiff has suffered detriment which is irreparable in an action

for damages and is *prima facie* entitled to invoke the aid of equity to obtain adequate relief, viz., the performance of the contract. The court may grant or withhold relief, according to the circumstances as they are made to appear by the evidence (*Christiansen v. Aldrich, supra*); but, having assumed jurisdiction of the action, it will, as in any other action, make use of all the instrumentalities at its disposal to preserve the *status quo* until the controversy can be determined on the merits. (*Taylor v. Florida East Coast Ry. Co.*, 54 Fla. 635, 127 Am. St. Rep. 155, 14 Ann. Cas. 472, 16 L. R. A., n. s., 307, 45 South. 574; 2 High on Injunctions, 4th ed., 1120.) The question here is not, as counsel seem to think, whether a case is stated for an injunction to restrain the collection of a judgment which should be deemed satisfied, but whether, pending the action, the court should restrain conduct on the part of the defendants which, but for the restraint, would result in a condition which would render the final decree in favor of plaintiffs ineffective. If the plaintiffs are entitled to any relief, they are entitled to have the judgment satisfied in conformity with the terms of the contract. This they cannot have if the sale is allowed to proceed and satisfaction is had by that means; for, under the changed conditions which would be found to exist at the termination of the action, the rights of the parties, as affected by the seizure and sale of the property, would be left wholly unadjusted.

The injunction was properly issued in the first instance, and the action of the court in denying the motion was correct. The order is affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

BRANDT ET AL., RESPONDENTS, v. MCINTOSH ET AL., DEFENDANTS; HULLER ET AL., APPELLANTS.

(No. 3,245.)

(Submitted February 10, 1913. Decided February 21, 1913.)

[130 Pac. 413.]

*Corporations—Actions by Minority Stockholders—Complaint—Injunctions Pendente Lite—Insufficiency—Conclusions—Duty of Stockholders Before Bringing Action.*

*Injunctions Pendente Lite—Insufficiency of Complaint—Conclusions.*

1. The complaint in a suit to set aside a judgment and vacate the sheriff's sale had to satisfy it, which alleged that the claim forming the basis of the judgment was a "pretense and fraudulent," and "in fraud of the rights" of plaintiffs, but did not set forth the facts upon which the charges of wrongdoing were grounded, was insufficient under section 6532, Revised Codes, and therefore did not justify the court in granting an injunction *pendente lite* against execution and delivery of the sheriff's deed.

*Corporations—Action by Minority Stockholders—Nature of Action.*

2. A suit brought by seven stockholders for themselves and a large number of others, not named, similarly situated, to set aside a sheriff's sale and enjoin the issuance of a deed thereunder, was one brought in behalf of the corporation, and not one to subserve the private, personal interests of plaintiffs.

*Same—Duty of Stockholders Before Bringing Action—Complaint—Insufficiency.*

3. Before stockholders may have recourse to a court of equity for redress of their grievances as to corporate affairs, they must first exhaust their remedy within the corporation itself; hence the complaint mentioned in paragraph 1 above, was further insufficient for failing to allege that plaintiffs were minority stockholders; that a demand had been made upon and refusal by the board of directors, or why a demand would have been useless.

*Same.*

4. An allegation of demand upon the president and secretary (directors) of a corporation for a redress of grievances of minority stockholders is insufficient in the absence of a statement showing the number constituting the board of directors.

*Same.*

5. The complaint referred to in the foregoing paragraphs was deficient, also, in that while alleging wrongdoing by the officers of the corporation in neglecting to effect a redemption of its property sold at the sheriff's sale sought to be vacated, it omitted to aver that the officers had funds, or the means of obtaining them, with which to do so.

*Appeal from District Court, Missoula County; F. C. Webster, Judge.*

ACTION by Henry E. Brandt and others against Robert G. McIntosh and others. From an order granting an injunction *pendente lite*, defendants Curtis, Huller and W. L. Kelley, sheriff, appeal. Reversed.

*Mr. Elmer E. Hershey*, for Appellants, submitted a brief and argued the cause orally.

In behalf of Respondents, there was a brief by *Messrs. McChesney, Becker & Bradley, Messrs. Woody & Woody*, and *Mr. A. J. Violette*, and oral argument by *Mr. Frank Woody* and *Mr. Violette*.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an appeal from an order granting an injunction. The complaint alleges that in June, 1911, Curtis Huller commenced an action in the district court of Missoula county against the Amador Copper and Gold Mining and Milling Company, Limited, a corporation, to recover \$5,822.44, alleged to be due him for work and labor performed for the corporation; that due service of summons was made; that on July 8, 1911, the default of the defendant corporation was entered, judgment recovered by default for the full amount demanded, and execution issued and placed in the hands of the sheriff of Missoula county for service. It is then alleged that in the proceedings leading up to the sheriff's sale, and in the sale itself, such irregularities occurred, and these are pointed out, that a sheriff's deed ought not to issue to the purchaser of the property at such sale. After a hearing the district court ordered an injunction to issue restraining the defendant sheriff from issuing the deed, and this appeal followed.

But for certain statements contained in the brief of respondents we would be uncertain as to the theory upon which plaintiffs proceeded, but we have the repeated assurance that the purpose of this suit is twofold: (1) To set aside the Huller judgment; and (2) to have vacated the pretended sheriff's sale. As

ancillary relief and for the purpose of maintaining the *status quo*, an injunction was demanded restraining the sheriff from executing or delivering a sheriff's deed pending a final determination of the cause.

1. The only allegations to be found in the complaint which [1] reflect in the least upon the character of Huller's claim or his judgment are these: "That the claim of the said Curtis Huller is a pretense and a fraudulent claim, approved by the said Robert G. McIntosh and the said George F. Stoney, together with other parties unknown to your orators, for the sole purpose of obtaining possession of the Amador mine and the other property mentioned in the said sheriff's sale for themselves in fraud of your orators' rights," *etc.* And, again: "Your orators further allege that the entire suit brought in this court by Curtis Huller is a mere scheme and conspiracy on the part of the said Curtis Huller, Robert G. McIntosh, and George F. Stoney and others unknown to your orators to obtain possession of the said premises described in the said sheriff's return in fraud of the rights of your orators," *etc.* It will be observed at once that in neither of these excerpts is there a single fact stated. Each consists of a bald conclusion. Under our Code, the complaint must contain a statement of the facts constituting the cause of action. (Rev. Codes, sec. 6532.) There is not any contention that Huller did not render services to the corporation of the value of the amount claimed, or that such services were not necessary; indeed, there is not a suggestion of any fact which tends in the remotest degree to impeach the integrity of the judgment. The employment of such extravagant terms as "fraud," "conspiracy," and other words of like malign import, unaccompanied by a statement of fact upon which the charges of wrongdoing rest, is a useless waste of words. (20 Ency. of Pl. & Pr. 786.) The complaint fails altogether to state facts sufficient to constitute a cause of action for setting aside the Huller judgment.

2. Assuming that sufficient facts are stated to warrant the action of the trial court in granting an injunction *pendente lite* if the corporation whose property is alleged to be in jeopardy



was plaintiff, we still have for consideration the question: Does [2] the complaint state a cause of action for an injunction in favor of these plaintiffs? The suit is brought by seven named stockholders of the Amador Copper and Gold Mining and Milling Company, Limited, for themselves and for 500 other stockholders in that company similarly situated. The purpose of having the sheriff's sale set aside is to protect property owned by the corporation, and not to subserve any private, personal interests of plaintiffs, as distinguished from the rights common to all other stockholders of the company. An action of this character is one brought in behalf of the corporation itself. (*McConnell v. Combination Mining & Milling Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.) It is elementary that, before [3] stockholders can go into a court, they must first exhaust their remedy within the corporation itself. If they hold a majority of the stock, they may control the election of the directors (Rev. Codes, sec. 3835), or, if they control two-thirds of the stock, they may remove an objectionable director (section 3838). Because of the power and authority thus lodged in the stockholders, courts of equity refuse to listen to their complaints, unless it appear that the situation of the parties is such that they cannot secure relief from the corporate authorities.

In the first place, this complaint does not even disclose that these named plaintiffs and those for whose benefit the suit was brought are minority stockholders. We are not informed what amount of the stock these plaintiffs own or control, or what the authorized or issued stock of the corporation is. Therefore the plaintiffs do not show their inability to secure relief within the corporation itself, and for this reason fail to state a cause of action. But, even if they are minority stockholders, they still fail to state a cause of action. It is an elementary rule of law that, before minority stockholders can be heard to prosecute a suit founded on a right of action existing in the corporation itself, they must allege that a demand has been made upon the board of directors or other governing body of the corporation for relief from the grievances of which they complain or for action in

conformity with their desires, and that such demand has been met by a refusal, or, in lieu of such demand and refusal, they must show such a state of facts as discloses that the demand, if made, would have been entirely unavailing. The complaint fails to disclose any demand whatever upon the board of directors to prosecute this suit or prevent the threatened injury to the corporation's property. It is alleged, however, "that your orators have requested the said officers and directors to redeem [4] said property from said liens and judgment and especially from the pretended sale to Curtis Huller, but that the said officers and directors have made no attempt to redeem said property and have refused and still refuse to do so," but this reference is only to the defendants McIntosh and Stoney, president and secretary, respectively, of the defendant corporation, and each a director thereof. We are not informed of the number of directors constituting the board, and it is therefore impossible to say that the acts of the president and secretary are such that relief could not be had from the board itself, and certainly neglect or misconduct on the part of those two officers is not sufficient to relieve the plaintiffs from the necessity of applying to the board of directors for a redress of their grievances or for action in conformity to their wishes. The authorities in support of these propositions are so numerous that reference to the texts where they are cited will suffice. (10 Cyc. 967; 26 Am. & Eng. Ency. of Law, 2d ed., 976; 20 Ency. of Pl. & Pr. 778; 2 Cook on Stock and Stockholders, 3d ed., sec. 701.)

While it is alleged that the officers have refused to redeem the [5] corporation's property from the pretended sale under the Huller judgment, the complaint fails to allege that the officers or directors have any funds, or the means of obtaining funds, with which to effect such redemption.

The complaint contains the following paragraph: "That since the year 1907 the operation and control of said mine has been in the hands of a board of directors, most of whom were residents of the state of Idaho, and the property has been managed and controlled since that time by said board of directors for their

own personal advantage and gain, and in such a manner that the directors or some of them may finally acquire the property herein described, to the great loss and detriment of your orators, and the stockholders represented by them." Assuming, without deciding, that the words "said mine" refer to all the real property sold at the sheriff's sale, the paragraph quoted is distinguished by the adroitness with which the pleader approaches facts, which might reflect adversely upon the conduct of the board of directors, without stating them. It will not do to say that the directors managed the property for their own personal gain. The facts must be stated upon which such a charge can rest.

Because the complaint does not state any cause of action in favor of these plaintiffs, the trial court erred in directing an injunction to issue, and the order is accordingly reversed.

*Reversed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

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MONAHAN, APPELLANT, v. ALLEN, RESPONDENT.

(No. 3,224.)

(Submitted February 14, 1913. Decided February 28, 1913.)

[130 Pac. 768.]

*Real Property—Sale—Option Contracts—Definition and Requisites—Incompleteness—Effect.*

**Options—Definition and Requisites.**

1. An option, in legal effect, is a continuing offer to sell, convertible into a contract by acceptance within the time stated; therefore, to constitute a particular instrument an option, the terms of the offer must be such that, when accepted, the offer and acceptance will make a binding contract.

**Same—Real Property—Incomplete Contract—Effect.**

2. *Held*, under the rule above, that an offer to sell certain real property for a named price, the terms of payment to be "\$5,000 cash at the time of the signing of deeds of conveyance and the remainder to be paid on the terms and under such agreements as may hereafter be

made," alleged by plaintiff to have been accepted by him "upon the terms set out in said option," was too vague, indefinite and uncertain to form a basis for a contract.

*Appeal from District Court, Park County; Frank Henry, Judge.*

ACTION by B. L. Monahan against F. W. Allen. Judgment for defendant and plaintiff appeals from it and an order denying him a new trial. Affirmed.

*Messrs. E. M. Hall and J. A. Poore*, for Appellant, submitted a brief and argued the cause orally.

*Mr. Fred. L. Gibson* submitted a brief and argued the cause orally, in behalf of Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action for damages for the breach of a contract. The complaint alleges that on September 30, 1909, the defendant gave to the plaintiff an option in writing to purchase the Allen ranch, comprising 4,380 acres, at \$10 per acre; that the option was to continue for thirty days, but within that period it was extended until December 1. A copy of the writing referred to is attached to the complaint. After reciting that the option to purchase is given to Monahan, and describing the land, the writing contains this principal clause: "It is hereby agreed that if the option for the purchase of the above property be exercised, that the terms for which shall be a payment of five thousand dollars (\$5,000) cash at the time of the signing of deeds of conveyance and the remainder of the purchase price of \$10.00 per acre shall be paid on the terms and under such agreements as may hereafter be made." It is further alleged: That after this writing was executed and delivered the defendant instructed plaintiff to deposit the first installment of the purchase price in any bank in Livingston; that thereafter, and on or about November 12, 1909, plaintiff notified defendant that

he accepted the offer to sell "upon the terms set out in said option"; that on November 29 plaintiff caused to be deposited in the National Park Bank of Livingston the first installment of \$5,000, notified defendant thereof, and demanded a deed conveying the property to a named purchaser, to whom plaintiff had resold the property; that on the twenty-third day of December, 1909, plaintiff and defendant agreed upon the terms and dates for the payment of the balance of the purchase price, as follows: \$5,000 on January 1 of each year for six years, beginning with 1911, and the balance on January 1, 1917; deferred payments to be made at the National Park Bank of Livingston, and to draw interest at the rate of seven per cent per annum. The plaintiff's readiness and willingness to perform all the terms of the alleged contract, a breach by the defendant, and the special circumstances tending to show the amount of plaintiff's damages are then set forth. The answer is a general denial. Upon the trial, at the conclusion of plaintiff's case, the court granted a nonsuit and entered judgment for defendant for costs. From that judgment, and from an order denying him a new trial, plaintiff has appealed.

1. That the writing, a copy of which is attached to the complaint, is not a contract for the sale of the Allen ranch, both parties are agreed. While it bound Allen to sell, it did not bind Monahan to purchase. If anything, it was an option, by the terms of which Monahan had a right to purchase the Allen ranch on or before December 1, 1909. (*Snider v. Yarbrough*, 43 Mont. 203, 115 Pac. 411; *Idé v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695.) Since an option, in legal effect, is a continuing [1] offer to sell, which is capable of being converted into a valid contract by acceptance, by the tender of the purchase price, or by the performance of the conditions named in the option, within the time stated and before the offer is withdrawn (*Idé v. Leiser*, above; *Gordon v. Darnell*, 5 Colo. 302), it follows that, to constitute a particular instrument an option, the terms of the offer must be such that, when accepted, the offer and acceptance will constitute a binding contract. The peculiar characteristics

of an option are not involved here; and neither are we concerned with all the essentials of a valid contract for the sale of real property. Speaking broadly, every express, executory contract, upon analysis, resolves itself into an offer by one party and an acceptance by the other (7 Am. & Eng. Ency. of Law, 2d ed., 125); and since an option is a continuing offer convertible into a contract by acceptance, it is subject to the same rules of law for determining its sufficiency as any other offer made in anticipation of the formation of a binding contract.

Our first inquiry, then, is: Was the offer made by Allen sufficient, so that, when accepted by Monahan, a binding contract for the sale of the Allen ranch resulted? The option was executed and delivered on September 30. Monahan testified that he accepted the offer, and notified Allen of his acceptance, about November 17. Paraphrased, Allen's offer is this: "I will sell [2] you my ranch [describing it] for \$43,800, payable \$5,000 upon the execution of the deed, and \$38,800 upon such terms and subject to such agreements as we may hereafter make." Monahan alleges that he accepted this offer "upon the terms set out in said option." In other words, Monahan agreed to purchase the Allen ranch for \$43,800, agreed to pay \$5,000 in cash upon the execution of the deed, and the further sum of \$38,800 upon such terms and under such agreements as he and Allen might thereafter make. Allen did not offer to agree to any terms which Monahan might suggest, and neither did Monahan agree to submit to any terms which Allen might see fit to impose. Even the time for the execution of the deed and the payment of the first installment is not fixed. Nothing whatever is said as to whether Allen should be secured for the payment of the balance due, whether he should receive interest on the deferred payments, or whether the deed should be delivered to Monahan or to the named purchaser, when it was executed. Indeed, aside from fixing the price of the ranch and the amount of the first installment, all other terms were left for future negotiations. The recital that \$5,000 was to be paid upon the execution of the deed, and the balance thereafter upon such

terms as might be agreed upon, negatives the idea that either party contemplated that the entire balance of \$38,800 should be paid at once upon the execution of the deed; or, in other words, the idea that a cash transaction was in contemplation is completely disavowed. Viewed in the light most favorable to the appellant, the best that can be said is that Allen agreed to execute a deed within a reasonable time after receiving notice of Monahan's acceptance and upon receiving payment of the first installment of \$5,000. But from any point of view Allen's offer to sell was conditional upon the ability of himself and Monahan to agree upon the terms for the payment of the balance of the purchase price. Such an offer is too vague, indefinite and uncertain to form the basis for a contract.

In 1 Page on Contracts, the author gives a critical analysis of a contract, enumerates the essential elements of an offer and discusses the subject of completeness, in section 27, as follows: "An offer, even if intended to create legal relations, must be so complete that, upon acceptance, an agreement is formed which contains all the terms necessary to determine whether the contract has been performed or not." And by way of illustrating the same rule from the negative point of view the author says: "An offer which leaves the amount of compensation to be determined by subsequent negotiations, fixing only the extreme limits within which the negotiations are to range, or one which leaves to a future valuation between the parties the price to be paid for realty or personalty, or one which leaves the quantity of material to be furnished, or the character of buildings to be erected, or the terms of payment and security for the purchase price, to be determined by future negotiation, is not complete." To the same effect is the decision in *Schenectady Stove Co. v. Holbrook*, 101 N. Y. 45, 4 N. E. 4, where it is said: "Until an offer is made by one party, complete and definite in all material terms, it is not possible for another to make a valid contract by the mere acceptance of a proposition. In other words, so long as there remains any of the material conditions of a contract to be settled and agreed upon, no binding agreement exists."

The acceptance, if of any efficacy whatever, must be coextensive with the offer. (1 Page on Contracts, sec. 45.) "An acceptance, to be good, must in every respect meet and correspond with the offer, neither falling within nor going beyond the terms proposed." (Knowlton's Anson on Contracts, 22; *Brophy v. Idaho P. & P. Co.*, 31 Mont. 279, 78 Pac. 493.) This being true, Monahan's acceptance must be construed to mean: "I will purchase the Allen ranch for \$43,800 and pay \$5,000 upon the execution of the deed, provided we can hereafter agree upon the terms for the payment of the balance." If, then, the offer is indefinite, and material terms are left for future negotiations, the acceptance, which must correspond with the offer, cannot aid it.

In 1 Story on Contracts, section 490, it is said: "In order to create a contract, it is essential that there should be a reciprocal assent to a certain and definite proposition. So long as any essential matters are left open for further consideration, the contract is not complete; and the minds of the parties must assent to the same thing in the same sense."

In *Long v. Needham*, 37 Mont. 408, 96 Pac. 731, this court stated the rule as follows: "An agreement to be finally settled must comprise all the terms which the parties intend to introduce. An agreement to enter into an agreement upon terms to be afterward settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled."

In *Bissinger v. Prince & Blackman*, 117 Ala. 480, 23 South. 67, it is said: "It is an elementary principle that there can be no valid contract without the mutual assent of the parties. Their minds must meet and concur as to all the essential elements of the contract involved, as to the subject matter, and as to their respective rights and duties." (See, also, 7 Am. & Eng. Ency. of Law, 2d ed., 113; *Etheredge v. Barkley*, 25 Fla. 814, 6 South. 861; *Watson v. Bayliss* (Wash.), 128 Pac. 1061.)

That Allen's offer and Monahan's acceptance of it did not conclude the negotiations was thoroughly understood by both parties. The writing, on its face, provides for further treaty



arrangements, and some of these negotiations were subsequently carried on. But if a contract for the sale of the Allen ranch was made between these parties at all, it was made when Monahan communicated his acceptance of Allen's offer; for the record discloses that there were not any other arrangements had prior to that time and none subsequently made, except as will be noted hereafter. That the terms left open for future negotiations were deemed important by both parties is apparent. Provision was made for the payment of only \$5,000 of the \$43,800 representing the purchase price of the ranch. Assuming that it sufficiently appears that Allen was to execute and deliver a deed to the property within a reasonable time after receiving notice of Monahan's acceptance and upon the payment of the first installment of \$5,000, he would be required to transfer the title to a stranger, and that, too, without any security for the balance of \$38,800, unless the question of security was comprehended within the terms which were left open for future negotiations; and that this was so, or, at least, was Monahan's understanding, is very clear, for he testified that the subject of security was discussed, but its determination was left open for negotiations to be had at a meeting to be held in January, which meeting never took place, and therefore the question of security was never settled. At the time of Monahan's acceptance the only terms agreed upon were the upshot price and the amount of the first installment. The other terms were left open for future determination, and because of this fact the offer and acceptance did not constitute a binding contract for the sale of the ranch. Upon principle, the following cases are in point: *Brown v. New York Central R. R. Co.*, 44 N. Y. 79; *Wills v. Carpenter*, 75 Md. 80, 25 Atl. 415; *Mattoon Mfg. Co. v. Oshkosh etc. Ins. Co.*, 69 Wis. 564, 35 N. W. 12; *Santa Rosa L. Co. v. Woodward*, 119 Cal. 30, 50 Pac. 1025; *Peet & Co. v. Meyer*, 42 La. Ann. 1034, 8 South. 534.

In *Krum v. Chamberlain*, 57 Neb. 220, 77 N. W. 665, there was presented the case of an offer to sell real estate with the entire price fixed, but the terms of payment and the security were left for future treaty. In speaking of the situation thus

presented, the court said: "So at this stage of the negotiations it is perfectly clear that both parties understood that the only things definitely determined upon were the price of the property, the rate of interest on the deferred payment, and the time when the transaction should be closed. A court could not enforce specific performance at the suit of either party, because it could not ascertain from the evidence how much of the purchase money should be paid in cash, for what amount a mortgage should be given, nor when the security should become enforceable."

In *Gunn & Co. v. Newcomb*, 82 Iowa, 468, 48 N. W. 989, the court was considering an offer to sell a stock of goods for an amount equal to the invoice price, to be determined by an inventory thereafter to be taken. It was held that an acceptance of this offer did not constitute a contract for the sale of the goods.

In *Wardell v. Williams*, 62 Mich. 50, 4 Am. St. Rep. 814, 28 N. W. 796, there was under consideration a question somewhat similar to the one now before us. Williams owned land which had been subdivided into lots. He offered to sell to Wardell the entire tract for a named amount, part cash and the balance secured by a mortgage upon the entire tract. In the offer there was contained a provision that the parties would thereafter fix a price for each lot, so that whenever the fixed value of a particular lot was paid it could be released from the mortgage. This offer was accepted, and in an action for damages for a breach of the alleged contract the question was presented: "Was there a valid contract between the parties?" The court answered the question in the negative, and in the course of the opinion said: "The offer, upon its face, looks to future action and negotiation between the parties to determine and agree upon the valuation to be placed upon the lots, which were to be released as their value so agreed upon should be paid upon the mortgage. \* \* \* The memorandum shows, upon its face, that the minds of the parties had not met, and that it was not evidence of a completed agreement, but stated terms which, if

accepted, would be the foundation of further treaty between the parties with reference to essential particulars, which, when agreed upon, would form part of the contract of sale and purchase."

In order to determine whether Monahan's acceptance of Allen's offer constituted a contract for the sale of the Allen ranch, it is only necessary to inquire what effect the failure of the parties thereafter to agree upon the terms for the deferred payments, or the security to be given Allen, would have upon the transaction. Neither agreed to subscribe to any particular terms, and if their subsequent negotiations had failed, neither could have been charged with a breach of the contract. So long as the minds of the parties did not meet upon all the material terms of the contract, the contract was incomplete. (*La Compania etc. de Bilbao v. Spanish-American L. & P. Co.*, 146 U. S. 483, 36 L. Ed. 1054, 13 Sup. Ct. Rep. 142.)

In *Sibley v. Felton*, 156 Mass. 273, 31 N. E. 10, the court had before it an instrument executed by parties owning certain industries, looking to a consolidation of their business. The written instrument, after reciting the purpose to be accomplished and enumerating certain terms, provided that a complete plan of unification should thereafter be prepared and agreed upon. In speaking of this transaction the court said: "It is clear that on some things the minds of the parties had met, and on others they had not. The scheme or plan was not completed, and until it was there was no complete or final contract. Until then it was provisional and incomplete, and failure to agree upon the details or upon a complete plan would render all the preliminary agreements void."

Until all the material terms were agreed upon between Allen and Monahan, either party was free to withdraw from the negotiations and terminate the transaction. (*Dietz v. Farish*, 53 How. Pr. (N. Y.) 217; *Deshon v. Fosdick*, 1 Woods (U. S.), 286, Fed. Cas. No. 3819; 7 Am. & Eng. Ency. of Law, 2d ed., 139, note.)

In *Ridgway v. Wharton*, 6 H. L. Cas. 238, it is said: "An agreement to be finally settled must comprise all the terms which the parties intended to introduce into the agreement. An agreement to enter into an agreement upon terms to be afterward settled upon between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled. Until those terms are settled, he is perfectly at liberty to retire from the bargain." This language is quoted with approval in *Brown v. New York Central R. R. Co.*, above, and a portion of it in *Long v. Needham*, above.

The distinction is to be made between an agreement to enter into a specific contract, whose terms are fixed in advance, and an agreement to enter into some sort of a contract, if its terms can thereafter be agreed upon. In discussing this subject the supreme court of Minnesota, in *Shepard v. Carpenter*, 54 Minn. 153, 55 N. W. 906, said: "A contract between two persons, upon a valid consideration, that they will, at some specified time in the future, at the election of one of them, enter into a particular contract, specifying its terms, is undoubtedly binding; and upon a breach thereof the party having the election or option may recover as damages what such particular contract, to be entered into, would have been worth to him, if made. But an agreement that they will in the future make such contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action. There would be no way by which the court could determine what sort of a contract the negotiations would result in; no rule by which the court could ascertain whether any, or, if so, what, damages might follow a refusal to enter into such future contract. So, to be enforceable, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations."

Monahan testified that in December, 1909, he and Allen met and agreed upon the amounts and maturities of the remaining installments of the purchase price; that they agreed that Allen

should have security for the deferred payments, but the character of the security was left open for determination at a meeting to be held in January following. The January meeting was never held, and the character of the security was never agreed upon. Allen refused to proceed, and since there was not any binding contract he could do so without incurring liability. If the January meeting had been held, but the parties had failed to reach an agreement as to the character and extent of the security which Allen should receive, all the prior negotiations would have ended with nothing accomplished.

2. It is beside the question to inquire whether the written option is a sufficient note or memorandum to meet the requirements of the statute of frauds. Since there was not any contract, there could not be a note or memorandum of a contract, within the meaning of those terms as employed in the statute of frauds.

The judgment and order are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

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MISSOULA STREET RAILWAY CO., APPELLANT, v. CITY  
OF MISSOULA, RESPONDENT.

(No. 3,220.)

(Submitted February 13, 1913. Decided February 28, 1913.)

[130 Pac. 771.]

*Municipal Corporations—Contracts—Statutory Requirements—  
Disregard of—Invalidity—Equitable Estoppel—Inapplicability of Doctrine.*

**Municipal Corporations—Contracts—Disregard of Statutory Requirements—Invalidity.**

1. Under the limitation—exclusive and not directory in its nature—upon the power of cities to let contracts prescribed by section 3278, Revised Codes, to the effect that all contracts requiring the expenditure of a sum in excess of \$250 must be let to the lowest responsible bidder, a contract entered into by a city with a street railway company, under the terms of which the latter was to be paid the cost

of removing and replacing its tracks on certain streets to enable the former to lay sewers, amounting to over \$5,500, was void.

Same—Estoppel—Inapplicability of Doctrine.

2. Plaintiff railway company, having been cognizant of the limitation placed by law upon the power of defendant city in the letting of contracts, was not in a position to claim recovery of the reasonable cost of the work performed by it in taking up and relaying its tracks as shown in paragraph 1, *supra*, under the doctrine of equitable estoppel applicable to dealings between natural persons and private corporations.

*Appeal from District Court, Missoula County; F. C. Webster, Judge.*

ACTION by the Missoula Street Railway Company against the City of Missoula. Judgment for defendant and plaintiff appeals. Affirmed.

*Messrs. W. M. Bickford, W. F. Wayne, and V. S. Kutchin*, for Appellant, submitted a brief; *Messrs. Bickford and Kutchin* argued the cause orally.

Can a municipal corporation make a binding contract to pay the actual costs of taking up and relaying a street-car track, when such taking up and relaying of the track is caused by the municipality's own act in building a sewer, and when the city is bound by the franchise previously granted appellant to remove and relay the same?

It will be conceded that "the police power, in so far as its exercise is essential to the health of the community, cannot be contracted away." (*New Orleans Gas Co. v. Drainage Commission of New Orleans*, 197 U. S. 453, 49 L. Ed. 831, 25 Sup. Ct. Rep. 471, and cases cited.) Section 5 of the franchise granted appellant by respondents expressly reserves to the city and persons, companies and corporations having authority from the city the right, upon notice, to take up appellant's tracks for the purpose of laying and replacing water-pipes, gas-pipes, electrical wires, telephone and fire-alarm wires, sewer-pipes or any purpose that may be deemed necessary by the city council, without permission from appellant or any liability for damages for any interruption of appellant's business; on condition, however, that the persons, companies or corporations removing appellant's

tracks shall relay the same. Appellant is unable to see in what essential manner the power of the city in the matter of laying its sewer or general control of its streets is limited or qualified by the above agreement; on the contrary, the provisions of the above enlarge the power of the city council, and authorize interference with the lines of the appellant for any purpose that the city may deem necessary. This clearly is a grant or reservation of a larger right than that inherent in the municipality under its police power, the police power being limited to acts which are both reasonable and necessary. (*Des Moines City Ry. Co. v. City of Des Moines*, 90 Iowa, 770, 26 L. R. A. 767, 58 N. W. 906; *Burg v. Chicago R. I. P. Ry. Co.*, 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680; *Weyl v. Chicago M. St. P. Ry. Co.*, 40 Minn. 350, 42 N. W. 24; *Evison v. Chicago St. P. M. Ry. Co.*, 45 Minn. 370, 11 L. R. A. 434, 48 N. W. 6; *White v. St. Louis & S. F. Ry. Co.*, 44 Mo. App. 450; *Pennsylvania Ry. Co. v. Jersey City*, 47 N. J. L. 286.) There is no question of relinquishing or contracting away an inherent right under the police power, but a simple question of an obligation to payment for services performed at respondent's request. "Public corporations, like individuals, are bound to act in good faith and deal justly. They cannot be allowed to enter into contracts involving others in expensive engagements; silently permit these contracts to be executed and then repudiate them. \* \* \* " (*Sacramento County v. Southern Pac. Co.*, 127 Cal. 217, 59 Pac. 568, 825.)

Assuming, for the purpose of argument, that the contract contained in section 5 of the franchise be a grant in excess of the power of the municipality to make, it still constitutes a contract between appellant and respondent in such a sense that the respective parties thereto are bound thereby, and their mutual rights and liabilities are therein defined until it is terminated by some proper action of the municipality. (*Chicago, B. Q. Ry. Co. v. Nebraska*, 170 U. S. 57, 42 L. Ed. 57, 948, 18 Sup. Ct. Rep. 513.)

We further submit that the respondents are estopped to deny their liability of contract as set up in appellant's complaint. In the case of *Schneider v. City of Menasha*, 118 Wis. 298, 99 Am. St. Rep. 996, 95 N. W. 94, the court held as follows: "If a contract be made by a corporation with a person, beyond the scope of its power, not, however, expressly prohibited by its charter or any law, if there be no bad faith in the matter in fact, and in and by the same property of such person passes into the possession of the corporation, and is actually used by it for legitimate corporate purposes, a cause of action will thereby accrue in favor of such person on equitable grounds to recover the value of such benefit, not exceeding that of the money or property acquired and used." (See, also, *Contra Costa Water Co. v. Breed*, 139 Cal. 432, 73 Pac. 189.) Where a municipal corporation receives and retains substantial benefits under contract which it is authorized to make but which is void because irregularly executed, or which it is not prohibited from making by a positive prohibition, it is liable in an action brought to recover a reasonable value of the benefits received. (*Lincoln Land Co. v. Village of Grant*, 57 Neb. 70, 77 N. W. 349; *Kansas City v. Wyandotte Gas Co.*, 9 Kan. App. 325, 61 Pac. 317; *Higgins v. City of San Diego*, 118 Cal. 524, 45 Pac. 824, 50 Pac. 670; *McGonigale v. City of Defiance*, 140 Fed. 621.)

A demurrer will not lie to a complaint if it states a cause of action upon any theory. (*Stadler v. City of Helena*, 46 Mont. 128, 127 Pac. 454.)

*Mr. Frank Woody*, for Respondent, submitted a brief and argued the cause orally.

The allegations in the first cause of action clearly show that the alleged contract was made with the mayor and members of the council individually, and not with the council as a body corporate, and is therefore void. (2 Dillon on Municipal Corporations, 5th ed., secs. 783, 788; 1 Abbott on Municipal Corporations, secs. 275, 276; *Haliburton v. Frankford*, 14 Mass. 214; *Butler v. Charlestown*, 7 Gray (Mass.), 12; *Paola & Fall River*



*Ry. Co. v. Commissioner*, 16 Kan. 302; *Williams v. Commissioners*, 28 Mont. 360, 72 Pac. 755; 7 Am. & Eng. Ency. of Law, 2d ed., 979.)

It further appears from the complaint that no attempt was made by the council to comply with the provisions of section 3278, Revised Codes. The allegations are in substance that the council ordered the tracks removed in order that sewers might be constructed, that the appellants objected to removing its tracks and that the mayor and members of the council thereupon agreed that if the appellant would remove its tracks and afterward relay them, the city could pay appellant the cost of so doing. The language used shows that no bids for removing and relaying the tracks were ever obtained from any person, and that when the alleged contract was made no specified prices were agreed upon other than the cost of taking up and relaying the tracks, whatever that cost might be. The mode of letting contracts by cities and towns when the amount involved exceeds \$250 is exclusive, and must be pursued, or the contract will not bind the corporation. (2 Dillon on Municipal Corporations, 5th ed., secs. 783, 801; 1 Abbott on Municipal Corporations, sec. 262; *Lebcher v. Commissioners*, 9 Mont. 315, 23 Pac. 713; *Williams v. Commissioners*, 28 Mont. 360, 72 Pac. 755; *Parr v. Village of Greenbush*, 72 N. Y. 463; *McCoy v. Briant*, 53 Cal. 247; *Argenti v. San Francisco*, 16 Cal. 255; *McCracken v. San Francisco*, 16 Cal. 591; *State ex rel. Shaw v. Trenton*, 49 N. J. L. 339, 12 Atl. 902; *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249; *Bowditch v. Boston*, 168 Mass. 239, 46 N. E. 1026.)

One of the uses to which streets may be put is the construction of sewers and drains therein by the public authorities. (3 Dillon on Municipal Corporations, 5th ed., secs. 1148, 1154; 3 Abbott on Municipal Corporations, sec. 874.) Sewers are constructed by municipalities under the police power of the state, delegated to such municipalities by the state through legislative enactment. (*Chicago etc. Ry. Co. v. Janesville*, 137 Wis. 7, 118 N. W. 182; *Keese v. Denver*, 10 Colo. 112, 15 Pac. 825; *Wolff v. Denver*, 20 Colo. App. 135, 77 Pac. 364; *District of Columbia v. Brooke*,

214 U. S. 138, 53 L. Ed. 941, 29 Sup. Ct. Rep. 560; *Van Wagoner v. Paterson*, 67 N. J. L. 455, 51 Atl. 922; *New Orleans Gas Light Co. v. Drainage Com.*, 197 U. S. 453, 49 L. Ed. 831, 25 Sup. Ct. Rep. 471; *People ex rel. Electric Lines Co. v. Squire*, 145 U. S. 175, 36 L. Ed. 666, 12 Sup. Ct. Rep. 880; *Lake Roland Elevated Ry. Co. v. Baltimore*, 77 Md. 352, 20 L. R. A. 126, 26 Atl. 510.)

"The principle obtains that public authorities may disturb the tracks of a company using the highways for the purpose of making proper improvements, the construction of sewers, laying water mains, or the like, and that any charges or expense caused by these acts to the railroad company in the temporary displacement and replacement must be paid exclusively by the company." (3 Abbott on Municipal Corporations, sec. 856; *Louisville City Ry. Co. v. Louisville*, 8 Bush (Ky.), 415; *Kirby v. Citizens' Ry. Co.*, 48 Md. 168, 30 Am. Rep. 455; *Detroit v. Ft. Wayne etc. R. Co.*, 90 Mich. 646, 51 N. W. 688; *San Antonio v. San Antonio St. R. Co.*, 15 Tex. Civ. App. 1, 39 S. W. 136; *National Waterworks Co. v. Kansas City*, 28 Fed. 921; *Belfast Water Co. v. Belfast*, 92 Me. 52, 42 Atl. 235; *Rockland Water Co. v. Rockland*, 83 Me. 267, 22 Atl. 166; *People v. Geneva etc. Traction Co.*, 186 N. Y. 516, 78 N. E. 1109; *Scranton Gas & Water Co. v. Scranton*, 214 Pa. 586, 6 Ann. Cas. 388, 6 L. R. A., n. s., 1033, 64 Atl. 84; *New Orleans Gas Light Co. v. Drainage Com.*, 197 U. S. 453, 49 L. Ed. 831, 25 Sup. Ct. Rep. 471; *Columbus Gas Light Co. v. Columbus*, 50 Ohio St. 65, 40 Am. St. Rep. 648, 19 L. R. A. 510, 33 N. E. 292; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 29 L. Ed. 510, 6 Sup. Ct. Rep. 265; *State v. Murphy*, 170 U. S. 78; *Chicago etc. Ry. Co. v. Nebraska*, 170 U. S. 57, 42 L. Ed. 948, 18 Sup. Ct. Rep. 513; *Middlesex Ry. Co. v. Wakefield*, 103 Mass. 262; *State v. Corrigan etc. Ry. Co.*, 85 Mo. 263, 55 Am. Rep. 361.)

By including section 5 in the ordinance granting the franchise to plaintiff company, the council attempted not only to abrogate, surrender and alienate a part of its police power, but also to place an additional burden upon the taxpayers of the city, and in so doing exceeded its powers; its act was therefore *ultra*

*vires*, and section 5 is therefore void. (1 Dillon on Municipal Corporations, sec. 245; 3 Abbott on Municipal Corporations, sec. 913; 3 Dillon on Municipal Corporations, secs. 1236, 1239, 1269; *State ex rel. City of St. Paul v. Minnesota Transfer Ry. Co.*, 80 Minn. 108, 50 L. R. A. 656, 83 N. W. 32; *Northern Pacific Ry. Co. v. State*, 208 U. S. 583, 52 L. Ed. 630, 28 Sup. Ct. Rep. 341; *Flynn v. Little Falls Elec. & Water Co.*, 74 Minn. 180, 77 N. W. 38, 78 N. W. 106; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. Ed. 269, 14 Sup. Ct. Rep. 437; *Anderson v. Fuller*, 51 Fla. 380, 120 Am. St. Rep. 170, 6 L. R. A., n. s., 1026, 41 South. 684; *Missouri v. Murphy*, 170 U. S. 78, 42 L. Ed. 955, 18 Sup. Ct. Rep. 505; *Chicago B. & Q. Ry. Co. v. Nebraska*, 170 U. S. 57, 42 L. Ed. 948, 18 Sup. Ct. Rep. 513; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. Ed. 341, 19 Sup. Ct. Rep. 77; *West Port v. Mulholland*, 159 Mo. 86, 53 L. R. A. 442, 60 S. W. 77; *Columbus Gas Light etc. Co. v. Columbus*, 50 Ohio St. 65, 40 Am. St. Rep. 648, 19 L. R. A. 510, 33 N. E. 292; *Chicago v. Chicago Union Traction Co.*, 199 Ill. 569, 65 N. E. 243; *Kirby v. Citizens' Ry. Co.*, 48 Md. 168, 30 Am. Rep. 455.)

While some courts hold that where an application of the strict rule relative to *ultra vires* contracts of private corporations would result in injustice, a more liberal rule should be adopted, the courts almost uniformly hold that municipal corporations are never estopped from setting up the defense of *ultra vires*. (1 Abbott on Municipal Corporations, secs. 258, 259; 2 Dillon on Municipal Corporations, 5th ed., sec. 791; *State ex rel. R. M. F. Co. v. Toole*, 26 Mont. 22, 91 Am. St. Rep. 386, 55 L. R. A. 644, 66 Pac. 496; *State ex rel. Lambert v. Coad*, 23 Mont. 131, 57 Pac. 1092.) The following decisions follow the rule laid down by the text-book writers: "One who performs labor and furnishes materials to a city under a void contract cannot recover on a *quantum meruit*." (*Keating v. City of Kansas*, 84 Mo. 415.) "A public corporation cannot be sued for damages resulting from an act which is *ultra vires*." (*City of Chicago v. Turner*, 80 Ill. 419; *Field v. City of Des Moines*,

39 Iowa, 575, 218 Am. Rep. 46; *Wheeler v. Essex Public Road Board*, 39 N. J. L. 291.) "The city and county incurs no liability for work done under a void contract, nor is there any guaranty on the part of the city and county that the forms of law have been complied with because its officers without authority attempt to contract. Those dealing with the city must see to it that its agents have power to act." (*Daly v. San Francisco*, 72 Cal. 154, 13 Pac. 321; *Nashville v. Sutherland & Co.*, 92 Tenn. 335, 36 Am. St. Rep. 88, 19 L. R. A. 619, 21 S. W. 674; *Mealey v. City of Hagerstown*, 92 Md. 741, 48 Atl. 746; *Newbery v. Fox*, 37 Minn. 141, 5 Am. St. Rep. 830, 33 N. W. 333; *McDonald v. Mayor etc.*, 68 N. Y. 23, 23 Am. Rep. 144; *Heidleburg v. St. Francois Co.*, 100 Mo. 69, 12 S. W. 914; *State v. City of Pullman*, 23 Wash. 583, 83 Am. St. Rep. 836, 63 Pac. 265; *Beyer v. Town of Crandon*, 98 Wis. 306, 73 N. W. 771; *Willis v. Wyandotte Co.*, 86 Fed. 872, 30 C. C. A. 445; *Wiegel v. Pulaski Co.*, 61 Ark. 74, 32 S. W. 116; *Hampton v. Logan Co.*, 4 Idaho, 646, 43 Pac. 324; *Austin Mfg. Co. v. Smithfield Tp.*, 21 Ind. App. 609, 52 N. E. 1011.)

The complaint showing on its face that the contracts are *ultra vires*, demurrer will lie. (14 Am. & Eng. Ency. Pl. & Pr. 243; *Brown v. Board of Education*, 103 Cal. 531, 37 Pac. 503; *Mealey v. City of Hagerstown*, 92 Md. 741, 48 Atl. 746; *Bazille v. Board of Commrs.*, 71 Minn. 198, 73 N. W. 845; *Newbery v. Fox*, 37 Minn. 141, 5 Am. St. Rep. 830, 33 N. W. 333.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by the plaintiff to recover the sum of \$5,507.13, alleged to be due from the defendant upon two express contracts, under the terms of which the defendant agreed to pay to plaintiff the cost of moving and relaying its tracks on two of defendant's streets. The complaint declares upon these contracts in separate counts. The court below sustained a general demurrer to each of them. Plaintiff having declined to amend, judgment was rendered dismissing the action. In all

essential particulars, the contracts are identical. The same objection is urged to both. A statement of the circumstances out of which the second grew will therefore be sufficient to present the question which it is necessary to examine and determine.

The fifth section of the franchise granted by the defendant to the plaintiff, and under which it constructed and is operating its railway, reserves to the defendant, and to persons, companies and corporations having authority from the defendant to use the streets, the right to take up the plaintiff's tracks and move the rails for the purpose of laying or repairing water and gas pipe, electric wires, sewer-pipe, *etc.*, or for any purpose that may be deemed necessary by the city council, without liability to the plaintiff for interruption of its business, "provided, however, that such work shall be done without any unnecessary delay, and that whenever the said rails or tracks are taken up or removed, the same shall, upon completion of said work, be relaid by the person, company or corporation taking up or removing the same, as soon as possible, and replaced in as good condition as the same were in prior to the taking up and removal thereof." During the year 1911 it became of public concern that a sewer be constructed by the defendant along Cedar street. This rendered it necessary that plaintiff's tracks be removed until the work could be completed. Thereupon "it was agreed by the defendant, acting through its mayor and city council, that, if plaintiff would remove its said track and line and replace the same and keep an account of the actual cost thereof and present a bill for same, the city would pay the cost of the removal and replacement of the tracks aforesaid." The plaintiff removed and replaced its tracks, expending in that behalf a total of \$2,716.65. The plaintiff also removed and replaced its tracks on Higgins avenue to permit a line of sewer to be laid therein, at a total cost of \$2,790.38. When bills for these amounts were presented to the council, payment was refused. The special ground of refusal does not appear; but the following are urged in justification of it: (1) That it was not competent for the city council, when it granted the franchise to plaintiff, to relieve it of the burden of the expense incident to the removal and re-

placement of its tracks whenever this became necessary in order to enable the city to install a sewer or to construct any other improvement along a street upon which the tracks had been laid, in that, by so doing, the city council undertook to abridge the police power of the city; and (2) that the contracts are void because it is apparent that they were entered into without observance by the city council of the requirements prescribed by the statute, and therefore no liability was cast by them upon the city.

Counsel for plaintiff contend: (1) That the franchise is a contract between the plaintiff and the city, and that, though it may be repudiated by the city at any time by legislative action, until this is done it is binding upon both parties; (2) that, since the contracts have been executed, the city is estopped to question its liability under them; and (3) that in any event the city will be required, upon the principle of equitable estoppel, to pay the reasonable value of the work.

For present purposes it may be conceded that the city council did not exceed its power by incorporating in the franchise the provision found in section 5 thereof. We incline to the view that it did not. The purpose of it was to adjust the mutual rights and obligations of the parties with reference to the expense which it was anticipated would be necessary for someone to bear when the city came to install its sewer system or otherwise to improve the streets, and to settle definitely all questions as to who should bear the loss incident to the interruption of plaintiff's business pending the installment of any improvement in course of construction. The adjustment of such questions, it would seem, has no direct connection with the safety and welfare of the public, but is connected rather with the fiscal policy of the city. So regarded, it does not fall within the governmental functions of the municipality, but rather within what are termed its private functions, in the exercise of which it is free to contract at its discretion; it not being prohibited from doing so by the law of its creation or the general law of the state. But be this as it may, if, in incorporating in the franchise the provision in question, the council exceeded its power,

the plaintiff has no claim against the city. From this point of view, the burden of expense and loss incident to the removal and replacement of its tracks and the interruption of its business must be borne by plaintiff. If the council did not exceed its power, the plaintiff still cannot recover on the contracts, because, assuming that they were entered into by the city in strict conformity with the law in other respects, they are void because they were let to the plaintiff in total disregard of the statute requiring such contracts to be let to the lowest responsible bidder.

Assuming that the plaintiff was freed, by the terms of the franchise, from any duty to remove and replace its tracks, when [1] they were removed by the city, the expense of the work required fell upon the city as a part of the expense of installing the lines of sewer. The plaintiff, in contracting to do this part of the work occupied the same relation to the city as any other person who might have contracted to do it. Section 3259 of the Revised Codes provides: "The city or town council has power: \* \* \* (63) To make any and all contracts necessary to carry into effect the powers granted by this title and to provide for the manner of executing the same." Section 3278 declares: "All contracts for work, or for supplies, or material, for which must be paid a sum exceeding two hundred and fifty (\$250) dollars, must be let to the lowest, responsible bidder, under such regulations as the council may prescribe. \* \* \* " The mode of exercising the power granted by the former section is subject to the limitation prescribed by the latter. Some of the courts hold that such a limitation is directory; but by the great weight of authority it is held to be exclusive and to apply to all municipal bodies. It falls within the general rule that, when the legislature has prescribed the mode by which a given power is to be exercised by a municipality, this mode must be pursued. It is the measure of power on that subject; and any attempt to pursue any other mode fails to bind the municipality at all. Contracts entered into in disregard of the limitation are void. Similar provisions have frequently been examined by this court, with the result that the rule, as above stated, has

become firmly established as the rule of decision in this jurisdiction. (*Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249; *Lebcher v. Board of Commrs.*, 9 Mont. 315, 23 Pac. 713; *State ex rel. Lambert v. Coad*, 23 Mont. 131, 57 Pac. 1092; *Williams v. Commissioners*, 28 Mont. 360, 72 Pac. 755; *McGillie v. Corby*, 37 Mont. 249, 95 Pac. 1063, 17 L. R. A., n. s., 1263; *Carlson v. City of Helena*, 39 Mont. 82, 17 Ann. Cas. 1233, 102 Pac. 39; *Morse v. Granite County*, 44 Mont. 78, 119 Pac. 286.) Any further discussion of it would serve no useful purpose. Tested by it, the contracts are void and cannot furnish the basis of recovery.

In support of their last contention, counsel for plaintiff cite several cases which, in effect, hold that it is only when the subject matter of the contract is entirely outside of the scope of the corporate powers, or the contract is clearly prohibited, that the municipality will be permitted to escape liability; and [2] they insist that, notwithstanding the contracts in question are void, the plaintiff upon equitable grounds ought to be permitted to recover the reasonable value of such benefits as have been received by the defendant. As already observed, the complaint declares upon the contracts according to their express terms. It is therefore doubtful whether its allegations are sufficient to support a judgment for the reasonable value of the work done. But assuming that they are sufficient, still we do not think the plaintiff entitled to recover. The result of such a holding would establish a rule which would abolish completely all limitation upon the power of the council to bind the city, and thus defeat the very purpose had in view by the legislature in enacting the statute, *viz.*, to promote economy and to protect the taxpayers from fraud and favoritism on the part of the council or the officers of the city. The equitable doctrine of estoppel can have no application to such a case. In entering into the contracts, the plaintiff was dealing with an artificial person, a creature of the law, whose authority to contract is conferred and limited by law. The facts were all known to it. There was no misrepresentation made to it. It knew the extent of the power of the council and how it must be exercised. It



dealt with the council at its own peril. (*Lebcher v. Board of Commissioners, supra*; *State ex rel. Stuewe v. Hindson*, 44 Mont. 429, 120 Pac. 485; *State ex rel. Lambert v. Coad, supra*.) If, when it began to work, the contracts were illegal, it knew it. It did the work with full knowledge of this fact. It was therefore not misled, and is not now in a position to allege that the defendant is estopped to question its own liability.

In *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96, in considering the question involved here, Mr. Justice Field said: "To the application of the doctrine of liability upon an implied contract, where work is performed by one, the benefit of which is received by another, there must not only be no restrictions imposed by the law upon the party sought to be charged against making, in direct terms, a similar contract to that which is implied, but the party must also be in a situation where he is entirely free to elect whether he will or will not accept of the work, and where such election will or may influence the conduct of the other party with reference to the work itself. The mere retention and use of the benefit resulting from the work, where no such power or freedom of election exists, or where the election cannot influence the conduct of the other party with reference to the work performed, does not constitute such evidence of acceptance that the law will imply therefrom a promise of payment." We are aware that in subsequent cases the supreme court of California has apparently departed to some extent, if not entirely, from the rule applied in this case, notably in *Sacramento County v. Southern Pac. Co.*, 127 Cal. 217, 59 Pac. 568, 825, *City of San Diego v. Higgins*, 115 Cal. 170, 46 Pac. 923, and *Contra Costa Water Co. v. Breed*, 139 Cal. 432, 73 Pac. 189. In these cases the court applied to the contracts of a municipality the principle of estoppel under the rules which are applicable to contracts between natural persons and private corporations, but, as was remarked by Chief Justice Beatty in his dissenting opinion in *Sacramento County v. Southern Pac. Co.*: "This doctrine sweeps away at once all limitations upon the power of the board, for it can readily be seen that the contractor

must always have it in his power to commence work just as soon as he has induced the board to enter into a contract in defiance of the regulations intended to govern their action; and it is also apparent that the board, which desires to make contracts in disregard of the law, will have the same motive to allow the commencement of work that they have to enter into the illegal contract." These cases are distinguished in their facts from the case at bar; but the rule contended for by plaintiff's counsel is recognized in all of them.

It may well be said that, in cases in which the municipality has acquired property which is still in specie, it may not be allowed to retain it and at the same time refuse to pay its reasonable value. In such a case, however, its liability would rest upon different principles. The contract being void, the title to the property would not vest under it, and the seller would be in a position to reclaim it, or, if restoration of it should be refused, to recover the reasonable value of it. But even in such a case the liability would not arise out of the contract. The rule declared in the *Zottman Case* was expressly recognized by this court in *State ex rel. Lambert v. Coad, supra*, in announcing the following conclusion: "Nor do we think the defendant is precluded from asserting the illegality of the action of the board in defense of his action in refusing plaintiff access to the records for the purpose of indexing them. The board's action in letting the contract was simply void for want of compliance with the law. Under the authorities cited, the execution of such a contract, or payment for work done under it, will be enjoined at the instance of a taxpayer; and when *mandamus* is resorted to to compel recognition of it by the auditing officer, whose duty it is to audit the accounts of the municipality and pay them, no relief will be granted."

For these reasons, we think the action of the court in sustaining the demurrer was correct. The judgment is accordingly affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

**CASES DETERMINED**  
 IN THE  
**SUPREME COURT**  
 AT THE  
**MARCH TERM, 1913.**

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THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY,  
 THE HON. SYDNEY SANNER,

} Associate Justices.

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WRIGHT, RESPONDENT, *v.* BROOKS ET AL., APPELLANTS.

(No. 3,215.)

(Submitted February 13, 1913. Decided March 4, 1913.)

[130 Pac. 968.]

*Real Property—Oral Contracts of Sale—Specific Performance—Possession by Vendee—Laches—Statutes of Limitation—Payment of Taxes by Defendant—Partnership—Power of Partner to Convey Land—Complaint—Misjoinder of Causes of Action.*

**Specific Performance—Real Property—Oral Contract of Sale—Complaint—Misjoinder of Causes of Action—Adverse Possession.**

1. Complaint in a suit to enforce specific performance of a contract of sale of real property, examined, and *held* not to disclose an alleged misjoinder, in that a cause of action based upon adverse possession for more than ten years was improperly joined with one for specific performance; the allegations therein germane to a claim of title by prescription having been pertinent to and not inharmonious with the prayer for specific performance, and the pleading as a whole inconsistent with a claim of legal title.

**Same—Possession Under Contract of Sale—Nature of Holding.**

2. One possessing land under a contract of sale holds, not adversely, but in subordination to, the legal title.

Same—Laches—Presumptions.

3. While laches may arise from an unexplained delay short of the period fixed by the statute of limitation, it will not be presumed from such delay alone.

Same—Possession and Improvements by Vendee—Effect on Holder of Legal Title.

4. Specific performance of an oral contract for the sale of real estate may be decreed where possession thereunder, taken by the vendee with the vendor's knowledge or consent, is followed by improvement of the property, even though no part of the purchase price has been paid; in such a case, where the vendee has made repeated efforts, and stands ready, able and willing to pay, the vendor holds the legal title in trust for the vendee.

Same—Statute of Limitation Commences to Run, When.

5. The statute of limitation in a case such as that mentioned in paragraph 4, *supra*, does not commence to run until the vendor has in some manner disavowed his trust.

Same—Laches—Statute of Limitation—General Demurrer.

6. The complaint in a suit for specific performance brought over thirteen years after the making of an oral agreement to sell real property, which, while alleging that defendant had been requested to convey but had refused to do so, did not state when such demand was refused, *held*, not vulnerable to a general demurrer upon the alleged ground that the pleading disclosed upon its face that the suit was barred by the statute of limitation.

Same—Laches not Alone Sufficient to Defeat.

7. A vendee in possession of realty is not barred from specific performance by mere delay in bringing suit; he may rest in security until his title or right of possession is attacked.

Equity—Findings—Evidence—Sufficiency—Appeal.

8. Unless the evidence preponderates against findings claimed to be insufficiently supported by it, they will be accepted on appeal as the established facts in the case.

Same—Partnership—One Partner Acting for Copartner—Evidence—Sufficiency.

9. Evidence *held* sufficient to justify a finding that the person who entered into an oral agreement to sell real property to plaintiff, in an action for specific performance, acted for himself as well as in behalf of his copartners.

Same—Partnership—Power of Partner to Convey Land.

10. Under a conveyance of realty to "H. P. Brooks & Bro.," a partnership, H. P. Brooks could rightfully enter into an agreement to sell the property and convey the legal title.

Same—Substantial Improvements—Evidence—Sufficiency.

11. Where the purchase price of two lots orally agreed upon between the parties was \$200, evidence that improvements valued at from six to seven hundred dollars had been placed thereon was a sufficient showing of substantial and permanent improvement to authorize specific performance.

Same—Payment of Taxes by Defendant—Effect.

12. Defendant, in a suit for the specific performance of a contract of sale of realty, who was found to have been at fault for delay in performance, was not entitled to prevail because of the fact that he had paid the taxes and other charges upon the property during plaintiff's occupancy, nor to reimbursement as a condition precedent to the relief granted plaintiff; the court having decreed, however, that the

latter pay interest on the purchase price for the entire period since the date of the agreement, defendant was not in a position to complain.

*Appeal from District Court, Fergus County; E. K. Cheadle, Judge.*

ACTION by Frank E. Wright against John Brooks and another. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Mr. Wm. M. Blackford, and Mr. John A. Coleman, for Appellants, submitted a brief; Mr. Blackford argued the cause orally.

Respondent's case resolves itself into this proposition: He demands a decree against appellant John Brooks for a conveyance of the entire interest in the lots, without having any agreement whatever with said appellant for a sale or conveyance of his undivided half interest, and without any ratification of such sale. There is no proof of any obligation binding either Anthony or appellant John Brooks to convey to respondent. The agreement is wanting in mutuality and not enforceable against appellant. (*Snyder v. Neefus*, 53 Barb. 63; *Dickinson v. Wright*, 56 Mich. 42, 22 N. W. 312; *Bronson v. Cahill*, 4 McLean (U. S.), 19, Fed. Cas. No. 1926.) Specific performance will not be decreed in favor of a purchaser against one part owner of real property sold by another, where the sale was not ratified by such part owner, or the purchaser had notice that the seller did not at the time own the whole property. (*Cochran v. Blout*, 161 U. S. 350, 40 L. Ed. 729, 16 Sup. Ct. Rep. 454.) The agreement could not have been enforced by respondent against Henry P. Brooks himself. "Equity will not decree the conveyance of property to which the defendant has no title, or decree the conveyance of a different title from that which a party is able to convey." (26 Am. & Eng. Ency. of Law, 2d ed., p. 40 (b), and authorities cited in note 2; *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889.) The agreement between respondent and said Henry P. Brooks was void so far as it af-

fected any interest of either of his co-owners, Anthony and John Brooks, in said lots. (Rev. Codes, sec. 5017, subd. 5; *Landt v. Schneider*, 31 Mont. 15, 77 Pac. 307; *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805; *Detroit P. & N. Ry. Co. v. Hartz*, 147 Mich. 354, 110 N. W. 1089; *Jackson v. O'Rorke*, 71 Neb. 418, 98 N. W. 1068; *Broom v. Pearson*, 98 Tex. 469, 85 S. W. 790, 86 S. W. 733; *Dickinson v. Wright*, 56 Mich. 42, 22 N. W. 312; *Snyder v. Neefus*, 53 Barb. 63.)

Finding No. 7 is not sustained by the evidence. There is an entire absence of anything whatever in the record showing any ratification in any form by appellant John Brooks or Anthony Brooks of the sale of the two lots, or either of them, to respondent. Any ratification of the oral agreement could be made only in writing. (Rev. Codes, sec. 5425; *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805; *Dickinson v. Wright*, 56 Mich. 42, 22 N. W. 312; *Snyder v. Neefus*, *supra*.)

"Where the improvements do not exceed the rental value of the premises, they will not be regarded as of such a substantial value and character as to constitute part performance so as to take the case out of the statute." (*Wooldridge v. Hancock*, 70 Tex. 18, 6 S. W. 818; *Schoonmaker v. Plummer*, 139 Ill. 612, 29 N. E. 1114; *Buhler v. Trombly*, 139 Mich. 557, 102 N. W. 647, 108 N. W. 343; *Burns v. Daggett*, 141 Mass. 368, 6 N. E. 727; *Poullain v. Poullain*, 76 Ga. 420, 4 S. E. 92; *Price v. Lloyd*, 31 Utah, 86, 86 Pac. 767, 8 L. R. A., n. s., 870; *Emmel v. Hayes*, 102 Mo. 186, 22 Am. St. Rep. 769, 11 L. R. A. 323, 14 S. W. 209.)

The delivery of the possession under a parol contract for the sale of land will not be sufficient of itself to take the case out of the statute of frauds. (*Purcell v. Miner*, 71 U. S. 513, 18 L. Ed. 435; *Stewart v. Stewart*, 3 Watts, 253; *Ballard v. Ward*, 89 Pa. 358; *Baldwin v. Baldwin*, 73 Kan. 39, 4 L. R. A., n. s., 957, 84 Pac. 568; *Roberts v. Templeton*, 48 Or. 65, 3 L. R. A., n. s., 790, 80 Pac. 481.) The statute of limitations applies to suits in equity as well as actions at law. (*Mantle v. Speculator Min. Co.*, 27 Mont. 473, 71 Pac. 665.) An action for specific performance of a contract to convey land may be barred by

the statute. (*Edwards v. Beck*, 57 Wash. 80, 106 Pac. 492; *Wilt v. Buchtel*, 2 Wash. Ter. 417, 7 Pac. 391; *Cooley v. Lobdell*, 153 N. Y. 596, 47 N. E. 793; *Allen v. Beal*, 3 A. K. Marsh. (10 Ky.) 554, 13 Am. Dec. 203.) The cases of *Davis v. Baugh*, 59 Cal. 568, *Fleishman v. Woods*, 135 Cal. 256, 67 Pac. 276, *Scadden Flat Gold Min. Co. v. Scadden*, 121 Cal. 33, 53 Pac. 440, *Love v. Watkins*, 40 Cal. 547, 6 Am. Rep. 624, imply that the vendee under an executory contract in possession must have paid the purchase price in order to become such equitable owner as will prevent the running of the statute of limitations.

That plaintiff was guilty of laches in bringing his action, see *Wolf v. Great Fall etc. Co.*, 15 Mont. 49, 38 Pac. 115; *O'Donnell v. Jackson*, 69 Cal. 622, 11 Pac. 251; *Delavan v. Duncan*, 49 N. Y. 485. The case of *Weber v. Marshall*, 19 Cal. 447, was one involving specific performance of a parol agreement. Judgment ran for specific performance, and upon appeal was reversed upon the ground that the vendee had been guilty of laches. The vendee had taken possession under the contract, and with reference to such possession not affecting the question of laches, the court said: "Nor does possession by the party seeking performance make the rule different." The same doctrine was affirmed in *Calanchini v. Branstetter*, 84 Cal. 249, 24 Pac. 149. (See, also, *Fowler v. Sutherland*, 68 Cal. 417, 9 Pac. 674; *Harris v. Hillegass*, 66 Cal. 79, 4 Pac. 987; *Hopkins v. Lewis*, 18 Cal. App. 107, 122 Pac. 433; *Bell v. Hudson*, 73 Cal. 285, 2 Am. St. Rep. 791, 14 Pac. 791; *Stevenson v. Boyd*, 153 Cal. 630, 96 Pac. 284; *Packard v. Booth*, 62 Wash. 333, 113 Pac. 774; *Thornburgh v. Cole*, 27 Kan. 490; *Molaskey v. Peery*, 76 Cal. 84, 18 Pac. 120.) "Laches in bringing a suit until it has become impossible to hear both parties and to ascertain the facts bars a recovery in equity." (*Ten Broeck v. Jackson*, 73 N. J. Eq. 734, 69 Atl. 490.)

The trial court should have sustained the defendants' demurrer to the amended complaint on the ground of the failure to state facts sufficient to constitute a cause of action. The

plaintiff fails to allege the circumstances showing good faith and reasonable diligence on his part. (*Kleinclaus v. Dutard*, 147 Cal. 245, 81 Pac. 516; *Hopkins v. Lewis*, *supra*; *Marsh v. Lott*, 156 Cal. 643, 105 Pac. 968.)

*Mr. Rudolf Von Tobel*, for Respondent, submitted a brief; *Mr. Henry C. Smith*, of Counsel, argued the cause orally.

Inasmuch as the title to the property stood in the name of H. P. Brooks & Brother, H. P. Brooks could give a deed conveying good title. (*Frost v. Wolf*, 77 Tex. 455, 19 Am. St. Rep. 761, 14 S. W. 440; *Arthur v. Weston*, 22 Mo. 378; *Winter v. Stock*, 29 Cal. 408, 89 Am. Dec. 57; *Rixford v. Zeigler*, 150 Cal. 435, 119 Am. St. Rep. 229, 88 Pac. 1092; *Barnett v. Lachman*, 12 Nev. 361; *McCauley v. Fulton*, 44 Cal. 355.) If H. P. Brooks could give deed conveying good title, upon the principle that the greater includes the less, he could enter into a valid, enforceable agreement for the sale of that property.

In view of the facts in this case, *Cochran v. Blout*, cited by appellant, is not in point on the proposition stated, but is rather in support of respondent's contentions. The same is also true of the citations from 26 American and English Encyclopedia of Law, and *Bell v. Bank of California*, for the reason that H. P. Brooks was able to convey title to these lots.

The possession of the premises alone, taken under the agreement, would avoid the statute of frauds. *Price v. Lloyd*, 31 Utah, 86, 8 L. R. A., n. s., 870, 86 Pac. 767, cited by counsel, is a very different case from the one at bar, and the points decided in that case do not affect this one. In any event, if it should be deemed in point, we maintain that it is directly opposed to the great weight of authority. (See *Willis v. Wozencraft*, 22 Cal. 608; *Love v. Watkins*, 40 Cal. 547, 6 Am. Rep. 624; *Central Pac. R. R. Co. v. Mudd*, 59 Cal. 585; *Whittier v. Stege*, 61 Cal. 238; *Lamme v. Dodson*, 4 Mont. 560, 2 Pac. 298; *Cartin v. Hammond*, 10 Mont. 1, 24 Pac. 627; *Howell v. Budd*, 91 Cal. 342, 27 Pac. 747.)



Upon the question of limitation: Admitting that the statute of limitations applies to actions for specific performance, it does not apply to the facts of this case, for the reason that plaintiff and respondent was in possession at all times. A vendee in possession under contract is not barred by the statute of limitations. (*Love v. Watkins*, *supra*, affirmed in *Gilbert v. Sleeper*, 71 Cal. 290, 12 Pac. 172; *McClure v. Colyear*, 80 Cal. 378, 22 Pac. 175; *Butler v. Hyland*, 89 Cal. 575, 26 Pac. 1108; *Warren v. Adams*, 19 Colo. 515, 36 Pac. 604; *Snider v. Johnson*, 25 Or. 328, 35 Pac. 846; *Smith v. Matthews*, 81 Cal. 120, 22 Pac. 409; *Watson v. Sutro*, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; *Galvin v. Palmer*, 113 Cal. 46, 45 Pac. 172.) Nor is the question one of payment, if the vendee is in possession, for, respondent having been ready and willing to pay the purchase money at any time, as found by the trial court, it is the same as though he had actually paid it. It would be highly inequitable to hold that the vendee might be put in possession under the contract, and make valuable improvements, but by a mere failure to actually pay the purchase money, owing to the refusal of the vendor to comply with his agreement, as in this case, that the statute of limitations should run against his action for specific performance. Such is not the law.

The doctrine of laches has no application, as against the respondent, for the reason that he was in possession at all times, under his agreement, and did all that he could reasonably be expected to do to bring the matter to a close, and his possession was well known to appellants. The doctrine applies rather against appellants than in their favor, for the reason that they knew respondent was in possession, under claim of right, and appellants were guilty of negligence in waiting all those years without asserting their own rights, if any. Under the facts in this case neither the case of *American Navigation Co. v. Basin*, 39 Mont. 425, 24 L. R. A., n. s., 305, 104 P. ac. 525, nor *Wolf v. Great Falls etc. Co.*, *supra*, are in point. Nor does the case of *O'Donnell v. Jackson*, cited by counsel, come within the provisions of this case, for the reason that the vendee does not seem

to have gone into possession under his agreement, and it does appear that the improvements made upon the land were made without the authority of vendor.

Respondent being in possession during all of these years, if appellants claimed any interest in the land, it was their duty to assert that right by demand and suit in ejectment, and never having made any demand for possession, nor brought any action to oust respondent, they were guilty of laches, and are thereby barred at this time from asserting any right. (*Willis v. Wozencraft*, 22 Cal. 608.) Not one of the many cases cited by appellants upon the question of laches, so far as we have been able to examine them, sustains a claim of laches against a vendee in possession, who has not repudiated his agreement.

MR. JUSTICE SANNER delivered the opinion of the court.

The amended complaint alleges, substantially, that in July, 1898, the respondent bought two certain lots in the city of Lewistown at the price of \$200 from Henry P. Brooks, who was then the owner; that the respondent immediately went into possession, and has since been in the "actual, quiet, open, notorious, undisturbed and exclusive possession" of said lots, and has placed valuable improvements thereon; that Henry P. Brooks died leaving a will, under which the appellant, John Brooks, was made residuary legatee, and by judicial decree the said lots have been distributed to John Brooks as residuary legatee; that John Brooks has sold said lots to appellant Kettleson; that prior to the death of Henry P. Brooks, and when the distribution occurred, the appellant John Brooks had actual notice of the rights and claims of respondent and of the existence of said agreement, and that the appellant Kettleson, prior to his purchase, had actual notice of the rights and claims of respondent; that respondent has always been ready and willing to pay for the lots upon conveyance of the same to him; that at divers times he demanded a conveyance of Henry P. Brooks, and also of John Brooks, and offered to pay the purchase price, but acceptance of payment and issuance of deed have been

refused; that about August 30, 1911, the appellant Kettleson, without the consent and against the instructions of respondent, went upon the said lots and tore down the fence inclosing the same, and tore down the fence inclosing his poultry-yard, and is making preparations to erect a house upon said lots. It is prayed, among other things, that respondent be adjudged the owner of said lots; that a decree be entered requiring appellants to convey upon payment of \$200; and that appellants be enjoined from asserting any interest or title in the lots or interfering with the same. This pleading was attacked by a demurrer on three grounds, two of which are that it does not state facts sufficient to constitute a cause of action, and that there is improperly united therein a cause of action based upon adverse possession for more than ten years with a cause of action for the specific performance of an alleged contract of sale.

We will first dispose of the question of misjoinder. Upon it [1] we have not been favored with any argument in appellants' brief, and should be inclined to rule the point as waived but for the fact that respondent himself insists here that he has stated an action to quiet title as well as for specific performance, and that under the pleadings, evidence and findings he is entitled to prevail upon either theory of the case. It is possible, by selecting certain allegations and ignoring others, to carve from the amended complaint a claim of title by prescription, but the allegations necessary to be so selected are entirely pertinent to, and are not inharmonious with, the prayer for specific performance; whereas the allegations to be ignored and the pleading, taken as a whole, are inconsistent with any claim of legal title, since one possessing lands under a contract of sale holds, [2] not adversely, but in subordination to, the legal title. (*Lamme v. Dodson*, 4 Mont. at 560, 594, 595, 2 Pac. 298.) We therefore conclude that the amended complaint should be viewed, as, in fact, it was viewed throughout the proceedings below, as seeking specific performance only, and not open to attack for misjoinder.

The point of the general demurrer is that the agreement was made in July, 1898, and the suit was commenced in September, 1911, thus disclosing a period of over thirteen years in which respondent did nothing in assertion of his rights; that, in the absence of excusatory averments, this is laches appearing upon the face of the pleading by which equity is negatived, and therefore a general demurrer will lie. The argument is plausible, but ineffective. Assuming that, where laches appears on the face of the complaint, advantage thereof may be taken by demurrer for substance, and conceding that, following the maxim, "Equity aids the vigilant," laches may arise from an unexplained delay short of the period fixed by the statute of limitation (*American Min. Co. v. Basin & Bay State Min. Co.*, 39 Mont. 476, 483, 24 L. R. A., n. s., 305, 104 Pac. 525; *Wolf v. Great Falls W. P. & T. Co.*, 15 Mont. 49, 38 Pac. 115), still laches will not be presumed from such a delay alone. (16 Cyc. 179; *Lux v. Haggin*, 69 Cal. 255, 267, 4 Pac. 919; *Marsh v. Lott*, 156 Cal. 643, 647, 105 Pac. 968.) Now, the statute invoked here is section 6451, Revised Codes, and whether we apply it as in itself a bar, or as a test for laches, the question arises: When, as to this case, did it commence to run?

It is the recognized rule, followed by this court, that specific performance of an oral contract for the sale of real estate may be decreed where possession thereunder, taken by the vendee with the vendor's knowledge or consent, is followed by improvement of the property, even though no part of the purchase price has been paid. (*Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805.) In such a case, where the payment and conveyance are to be concurrent acts, and where the vendee has made repeated efforts to pay, and stands ready, able and willing to pay, the vendor is placed in the same position as though payment had been made; that is to say, he holds the legal title in trust for the vendee. (*Cobban v. Hecklen*, *supra*; *Finlen v. Heinze*, *supra*; *Ives v. Cress*, 5 Pa. 118, 47 Am. Dec. 401; *Willis v. Wozencraft*, 22 Cal. 608; *Whittier v. Stege*, 61 Cal. 238, 241; *Howell v. Budd*, 91 Cal. 342, 351,

27 Pac. 747.) On this theory the statute of limitation does not [5] commence to run until the vendor has in some manner disavowed his trust (36 Cyc. 732, f), which disavowal may, in cases such as this, consist of a flat refusal to convey or to recognize the contract. Turning, now, to the amended complaint, we find the charge that both Henry P. Brooks and John Brooks have [6] refused and neglected to convey, notwithstanding demand. But when? It may have been more than five years before the commencement of the action; it may have been less. This condition of the pleading, however it may be subject to a demurrer for ambiguity, certainly does not require the conclusion that the statute has run. Moreover, the weight of authority is that the vendee in possession cannot be barred from specific performance [7] by mere delay, however long, because his possession is a continued assertion of his claim. He may rest in security until his title or right of possession is attacked. (16 Cyc. 174; 36 Cyc. 732; *Love v. Watkins*, 40 Cal. 547, 564, 6 Am. Rep. 624; *Gilbert v. Sleeper*, 71 Cal. 290, 294, 12 Pac. 172; *Snider v. Johnson*, 25 Or. 328, 331, 35 Pac. 846.) We are therefore of opinion that the amended complaint is good as against the general demurrer.

The trial resulted in certain findings of fact by the court, from which conclusions of law were drawn, in effect directing a decree of specific performance as prayed by respondent, and such decree was thereafter duly entered. These findings of fact are vigorously assailed for what they contain and for what they do [8] not contain. As to their content, we say that, although a remarkable situation is disclosed by the evidence, yet the evidence does not preponderate against the findings. They have sufficient support in the evidence to require their acceptance by this court as the established facts in the case. (*Boyd v. Huffine*, 44 Mont. 306, 120 Pac. 228; *Pope v. Alexander*, 36 Mont. 92, 92 Pac. 203, 565.) As to their alleged deficiencies, these are not in themselves, singly or collectively, of sufficient importance to demand a reversal of this case. They consist, for the most part, of facts or circumstances not necessary to a determination of the case, or of alleged facts or circumstances not required by the

evidence; and the failure to find them could not, with the possible exception of the payment of taxes, which we shall consider later, have operated to the prejudice of the appellants. Certain questions of law, however, are raised by the evidence and the findings, to which we shall briefly advert.

It is said that when the agreement was made Henry P. Brooks was not the sole owner of the property; that respondent then knew it; and that under such circumstances specific performance will not be decreed. Appellants forget that there was a visible occupancy of these premises for thirteen years immediately [9] following the agreement, and that the evidence furnished by themselves tends to establish that when the agreement was made the title was in "H. P. Brooks & Bro."; that "H. P. Brooks & Bro." was a "concern"—apparently a partnership—composed of Henry P. Brooks, Anthony Brooks, and the appellant John Brooks, having business other than the owning of these lots, and owning them as it owned its other property; that Anthony Brooks and John Brooks possessed interests in these lots, only as they were interested in the "concern"; that Henry P. Brooks tended to its business, particularly at the Lewistown end; that John Brooks for eight or ten years personally knew of respondent's occupancy and inclosure of the premises, and made no objection of any kind. It is nowhere asserted by John Brooks that Henry P. Brooks was without authority to contract in behalf of the other members of the "concern"; and it appears that when respondent broached the subject of a deed to John Brooks he said respondent would have to see Henry P. Brooks about the matter. We think this was ample to justify the findings that in the agreement with respondent, Henry P. Brooks acted in behalf of his associates as well as of himself, and to estop any denial of John Brooks in that regard. Under these findings the case falls, not within *Cochran v. Blout*, 161 U. S. 350, 40 L. Ed. 729, 16 Sup. Ct. Rep. 454, cited by appellants, but within the rule recognized by this court in *Cobban v. Hecklen*, *supra*. But there is another aspect of this matter which is decisive against appellants.

Upon well-recognized principles the legal title to the lots in question, at the time the agreement was made, stood wholly in Henry P. Brooks by virtue of the deed from De Witt to H. P. [10] Brooks & Bro. (*Barnett v. Lachman*, 12 Nev. 361; *Winter v. Stock*, 29 Cal. 408, 89 Am. Dec. 57; *Arthur v. Weston*, 22 Mo. 378; *Ennis v. Brown*, 1 App. Div. 22, 36 N. Y. Supp. 737.) As long as it so remained, Henry P. Brooks could convey the legal title, leaving his associates to their remedy of accounting for the proceeds (*Barnett v. Lachman*, *supra*); and if he could do that he could make the agreement in question.

It is contended that the improvements placed upon the lots by respondent were not such as to constitute part performance, [11] because they did not equal or exceed the rental value of the lots while occupied by him. We do not know what the rental value may have been. The purchase price agreed upon was \$200. The improvements consisted of fencing and of a barn, lathed and plastered in the lower part, used as a chicken-house; and there was evidence to the effect that the value of these improvements amounted to six or seven hundred dollars. We think this a sufficient showing of substantial and permanent improvement.

The evidence established that throughout the entire period of respondent's occupancy the taxes and public charges upon the lots were paid by Henry P. Brooks or John Brooks, and error is assigned because the trial court did not so find. We see no error here. This court has held that in an action to quiet title, with taxes paid by the defendant in good faith, it is the duty of the trial court to require reimbursement as a condition to the relief (*Larson v. Peppard*, 38 Mont. 128, 133, 129 Am. St. Rep. 630, 16 Ann. Cas. 800, 99 Pac. 136), and we think counsel confuse that situation with the totally different one now presented. [12] Whether the payment of the taxes by Brooks is considered to be of importance on account of the failure of the trial court to impose reimbursement as a condition to the relief granted, or as affecting the respondent's right to any relief, we are not clearly informed. But in either view it is decisive that the court found, not the respondent, but Henry P. Brooks and John

Brooks, to have been at fault, and fixed upon them the blame for the long continuance of the legal title in their names. While public charges against real estate are properly assessed to the holder of the legal title, and it is his privilege to pay them in order to protect it, yet in this case he could at any time have shifted that burden to the shoulders of the respondent by simply keeping the agreement. Such public charges as are to be expected in the usual course of events are like increases in value or depreciation in the currency after contract of sale and pending conveyance, in that they will not absolve the vendor, nor entitle him to any added recompense, where he is at fault for delay in performance. (*Gotthelf v. Stranahan* (City Ct. Brook.), 19 N. Y. Supp. 161, 138 N. Y. 345, 351, 20 L. R. A. 455, 34 N. E. 286; *King v. Raab*, 123 Iowa, 632, 99 N. W. 306, 307; *Pomeroy on Specific Performance*, sec. 322.) However, the court did require the respondent to pay interest at the legal rate on the purchase price for the entire period since the date of the agreement. This was sufficient.

Much space is devoted in the brief of appellants to the statute of limitations and to the question of laches. We have discussed these matters, so far as raised by the demurrer to the amended complaint, and the question now is whether limitation or laches is disclosed by the evidence. According to the evidence, respondent made several demands on Henry P. Brooks for a deed, which was promised, but deferred; in the year of, or the year before, the death of Henry P. Brooks, respondent made a final demand upon him, as well as upon John Brooks, and then occurred the first refusal to complete the agreement; Henry P. Brooks died in February, 1909; the first hostile invasion of respondent's possession occurred August 30, 1911, and this action was commenced on September 9, 1911. We fail to see how this action can be held barred by the provision argued in the brief (Rev. Codes, sec. 6451), or by any of the statutes pleaded in the answers. And if it is borne in mind that, where payment, which is to be concurrent with the conveyance, is prevented by the vendor's fault, the case is the same as though pay-



ment were made, it can be readily seen that the authorities cited in support of the contention of appellants do, when rightly understood, make for the very opposite conclusion. (See *Edwards v. Beck*, 57 Wash. 80, 106 Pac. 492; *Love v. Watkins*, *supra*; *Brennan v. Ford*, 46 Cal. 7, 14; *Gerdes v. Moody*, 41 Cal. 335, 350.)

As to laches, we have already indicated that the weight of authority denies the application of this doctrine to the vendee in possession prior to challenge of his title or right of possession. But the appellants cite, among others, three decisions of this court: *Wolf v. Great Falls W. P. & T. Co.*, *supra*, *American Min. Co. v. Basin & Bay State Min. Co.*, *supra*, and *Streicher v. Murray*, 36 Mont. 45, 92 Pac. 36, upon which we are asked to decide that laches did, as a matter of fact, appear upon the trial of this case. These citations are not in point; the last two are not even suggestive, except as to certain general statements, to the effect that laches may or may not exist independently of the statute of limitations, but depending upon the circumstances of the individual case. In *Wolf v. Great Falls W. P. & T. Co.*, however, a case of laches was held established in an action for specific performance, upon the theory that abandonment of his claim by the vendee was shown by the following circumstances: A written agreement was made for the sale of a town lot in Great Falls for the purchase price of \$350, payable in installments at fixed times; it was expressly stipulated that "the above premises are sold to said second party for improvement, and the said party of the second part agrees and obligates himself, heirs and assigns, that he or they will on or before the first day of August, 1887, build and construct a frame building of the value not less than \$500"; the vendee was also to pay the taxes; the execution and delivery of the deed was made contingent upon the prior performance of the conditions imposed upon the vendee, and the vendee was given possession under the agreement; the vendee did not pay the installments of the purchase price, nor the taxes; nor did he construct to completion the improvement as agreed; the successor in interest of the vendor took pos-

session after default in these matters; later, and on October 22, 1887, the vendee tendered the balance of the purchase price, which was refused; on April 29, 1891, he commenced his action for specific performance, and no explanation was offered in the pleadings or at the trial for the delay. The above not only shows how divergent was the situation from the case at bar, but illuminates the following language of the decision: "We have confined the consideration to the question as to whether the plaintiff was guilty of inexcusable laches in commencing his suit for specific performance after he was ousted from the possession of the real estate in question, and knew that the defendant would not comply with the contract of sale thereof, unless compelled to do so." Equally inept, for appellants' purposes, is the decision in *Marsh v. Lott, supra*, in which the supreme court of California said: "Of course, notwithstanding the delay in moving to enforce the alleged contract, the circumstances may be such as to prevent any presumption of acquiescence or abandonment, as, for instance, where a vendee is in possession of the property under the alleged contract and continues in such possession, claiming under the contract, notwithstanding the attempted repudiation."

We think that all the findings are sufficiently supported by the evidence, and that the case, taken as a whole, authorizes the decree.

The judgment and order appealed from are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

## IVANHOFF, RESPONDENT, v. TEALE, APPELLANT.

(No. 3,204.)

(Submitted February 17, 1913. Decided March 7, 1913.)

[130 Pac. 972.]

*Contracts—Performance—Sufficiency of Pleading—Waiver of Defect, When—Mechanic's Lien—Foreclosure—Defective Description of Lands Affected, When Fatal—When Plaintiff Entitled to Personal Judgment.*

**Pleading—Substitution of "Defendant" for "Plaintiff"—Waiver of Defect, How.**

1. An inadvertent substitution of the word "defendant" for "plaintiff" in the complaint does not render the pleading insufficient, but subject to special demurrer on the ground of uncertainty, which defect is waived by answering to the merits.

**Contracts—Performance—Sufficiency of Pleading.**

2. Under section 6572, Revised Codes, performance by plaintiff of his contract was sufficiently alleged by his statement that "defendant (inadvertently substituted for "plaintiff") actually completed all of the work and labor to be by him performed under said contract and did all of the things in said contract of him required to be done."

**Mechanic's Lien—Complaint—Erroneous Description of Land—When Fatal.**

3. One of the prerequisites prescribed by section 7291, Revised Codes, to make valid a lien on land for labor performed in clearing it was a notice containing a description thereof sufficiently accurate to enable identification of the property affected; hence, where in a suit to foreclose such a lien the description in the decree differed from that found in the complaint as well as that contained in the notice, so that identification of the lands sought to be charged was impossible, the decree ordering them to be sold must be reversed.

**Same—Failure to Establish—Personal Judgment.**

4. Where one to whom money is due for labor performed fails to establish a lien on the property on which it was done, because of non-observance of the statutory provisions relative to perfecting it, he is nevertheless entitled to a personal judgment for the amount found due from defendant.

*Appeal from District Court, Ravalli County; J. B. Poindexter, a Judge of the Fifth Judicial District, presiding.*

ACTION by Peter Ivanhoff against Sarah C. Teale. Judgment for plaintiff; defendant appeals. Remanded, with directions.

Cause submitted on briefs of counsel.

Mr. C. M. Parr, for Appellant.

*Messrs. O'Hara, Edwards & Madeen, for Respondent.*

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to foreclose a statutory lien for a balance alleged to be due to plaintiff for services rendered by him under a contract, by the terms of which he agreed to clear certain lands, situated in Ravalli county, belonging to defendant at a stipulated price of \$25 per acre. Subsequent to the making of the original contract, its terms were, by mutual consent of the parties, extended so as to include other lands. The complaint alleges "that on the twentieth day of April, 1910, plaintiff entered upon the performance of said contract, and the defendant actually completed all of the work and labor to be by him performed under said contract and did all of the things in said contract of him required to be done; that by reason of said work and labor performed defendant became indebted to said plaintiff for the clearing of eighty-eight acres at \$25 per acre, making a total sum of \$2,200, of which said amount defendant paid to the plaintiff \$949, leaving a balance due and owing and unpaid of \$1,251, no part of which has been paid." It then alleges the filing of the notice of lien with the clerk and recorder of the county within ninety days after completion of the work, as required by section 7291, Revised Codes. A copy of the notice of lien is attached to the complaint as an exhibit. The issue tried was whether the work had been performed by the plaintiff in accordance with the terms of the contract and had been so accepted by the defendant. The court found for the plaintiff, and that there was due him a balance of \$651. It rendered a decree declaring this amount to be a lien on defendant's lands, and ordered them to be sold to satisfy it. The appeal is from the decree.

It is contended that the complaint does not state facts sufficient to constitute a cause of action, in that it alleges "the defendant actually completed all of the work," *etc.* This contention is without merit. It is apparent that the pleader, in

[1] drawing the complaint, inadvertently substituted the term "defendant" where he intended to use the term "plaintiff." At most, this substitution of terms served only to render the pleading open to objection by special demurrer on the ground of uncertainty. Such a defect is waived by answer to the merits. (*Eadie v. Eadie*, 44 Mont. 391, 120 Pac. 239; Rev. Codes, sec. 6539.)

It is also argued that the complaint does not allege the performance of the contract on the part of plaintiff in terms sufficiently direct and certain. If the pleading be construed [2] according to its purport as indicated above, it can mean nothing less than that the plaintiff fully performed all the conditions of the contract to be by him performed. This meets the requirement of the statute. (Rev. Codes, sec. 6572.)

The last contention is that the decree does not conform to the allegations of the complaint, and hence that the relief granted [3] is not warranted by it. When we come to compare the description of the lands in question, as set out in the complaint, with that contained in the notice of lien and also with that found in the decree, we find it wholly inconsistent with them, not only with reference to the section subdivisions, but also with reference to their situation in the section, township, and range. In the complaint they are described as situated in sections 14 and 28, in township 5 north, range 21 west. In the notice they are described as situated in sections 14, 27, and 28, in the same township and range. In the decree we find two descriptions. It is first recited that the plaintiff filed with the clerk and recorder his notice of lien upon certain lands described therein. These are described as situated in part in section 14, township 3 north, range 21 west, and the rest as situated in sections 27 and 28, township 5 north, range 21 west. Later those described as subject to the lien are referred to as situated in the same townships and ranges, but the subdivisions of the sections mentioned are different. Besides, when the section subdivisions mentioned in the several descriptions are compared, no two of the descriptions are consistent. Such is the confusion and uncertainty in

the record in this respect that it is impossible for us to ascertain whether any of the lands described are subject to the lien. The statute requires the description to be such as to identify the property sought to be affected by the lien. (Rev. Codes, sec. 7291.) This is a prerequisite to the validity of the lien; for, in order to perfect the claim, all the different requirements of the statute must be substantially complied with. (*Yerrick v. Higgins*, 22 Mont. 502, 57 Pac. 95; *McGlaulin v. Wormser*, 28 Mont. 177, 72 Pac. 428.)

Under the findings the plaintiff is entitled to a personal judgment [4] against defendant for the amount found due, in any event. Whether he is also entitled to a lien must, under the circumstances, be determined by the district court, after the plaintiff has been afforded the opportunity, if this can be done, to amend the complaint so as to make the description therein agree with the description in the notice of lien.

The cause is therefore remanded to the district court, with directions to set aside the decree, and, upon further proceedings not inconsistent with the suggestions herein, to ascertain what portion of the lands, if any, are sufficiently described in the notice to identify them. That court will then enter a decree declaring the balance found due plaintiff a lien thereon. If, upon such further proceedings, the description contained in the notice is found insufficient to identify any portion of the lands, the court will render and enter a personal judgment against the defendant for the amount found due, with costs.

*Remanded, with directions.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

CHICAGO, MILWAUKEE & ST. PAUL RY. CO., RESPONDENT,  
v. SWINDLEHURST, APPELLANT.

(No. 3,279.)

(Submitted February 15, 1913. Decided March 8, 1913.)

[130 Pac. 966.]

*Foreign Corporations—Filing of Articles—License Fees—Constitution—Taxing Interstate Commerce—Due Process of Law—Statutes—Invalidity.*

1. *Held*, that section 165, Revised Codes, which provides that for filing copies of charters or articles of incorporation of foreign corporations the secretary of state shall exact the same fee as domestic corporations are required to pay,—a fixed number of cents per \$1,000 of the par value of the entire capital stock,—is void in so far as it affects a corporation engaged in interstate commerce, organized under the laws of a sister state, which seeks to do business in this state, in that it imposes a tax upon interstate commerce, is an imposition upon the corporation's property beyond the limits of the state, and therefore constitutes a taking thereof, without due process of law, to the amount of the fee sought to be collected.

Decisions of Supreme Court of United States—Conclusive upon State Courts.

2. Decisions of the supreme court of the United States are conclusive upon state courts.

*Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.*

ACTION by the Chicago, Milwaukee and St. Paul Railway Company against T. M. Swindlehurst, secretary of state of the state of Montana. From a judgment for plaintiff, defendant appeals. Affirmed.

Mr. D. M. Kelly, Attorney General, submitted a brief; Mr. W. H. Poorman, Assistant Attorney General, argued the cause orally.

The provisions of section 165, Revised Codes, fix fees which the secretary of state "must charge and collect" for receiving and filing articles of incorporation. So long as this statute remains the law, it is binding upon him, and he may exercise no discretion but must obey the positive mandates of the law. Subdivision 10 of this Article makes the provisions of the Article

applicable to foreign corporations. Under this law, it was and is the duty of the appellant to charge respondent company the filing fee complained of. This statute is itself a sufficient answer to the contention of the respondent.

The appellant contends that under the power vested in the state, it has the authority to prescribe the terms and conditions upon which any corporation either foreign or domestic may transact business within its confines, and pursuant to that power, it may fix the fees required to be paid by any corporation before it is entitled to recognition as a corporate entity within the state. (See *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. Ed. 164, 12 Sup. Ct. Rep. 403; *Allen v. Pullman Palace Car Co.*, 191 U. S. 171, 48 L. Ed. 134, 24 Sup. Ct. Rep. 39.)

But if the state in fixing the fee has no right to take into consideration the value of the property of the corporation situate wholly without the state of Montana, then we contend that it has an undoubted right to graduate the fee in accordance with the value of the corporate property situate within the state, and if it appears that the corporation does own property, both within and without the state, the burden of showing the value of its property located within the state rests with the corporation asking to have its papers filed, and until such corporation makes such segregation the secretary of state is justified in computing the fee upon the entire value of the corporation's property as appears in its articles tendered for filing. A domestic corporation is required to pay upon its capital stock, all of which is presumed to be within the state because it is a domestic or state corporation. No foreign corporation "shall have or be allowed to exercise or enjoy within the state any greater rights or privileges than those enjoyed by" domestic corporations. (Const., Art. XV, sec. 11.) Plaintiff, a Wisconsin corporation, is subject to the jurisdiction of that state as to property and operation within it, but the laws of Wisconsin do not extend beyond the boundaries of the state, and it cer-



tainly cannot be contended that this corporation, either in its property holdings or its method of operation, is not subject to some law, and as the state law only has state operation, it must be subject to the law of the state where it operates. Hence it necessarily follows that each state does have jurisdiction and authority over interstate corporations transacting business within its borders. A question might arise as to the reasonableness of the regulation, but no question exists as to the right of the state to bring within the operation of its reasonable law all corporations as well as individuals. And it appears in this case that the respondent is engaged in an intrastate business as well as in an interstate business.

The case of *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 54 L. Ed. 355, 30 Sup. Ct. Rep. 190, may be clearly distinguished from the case at bar. That was an action of ouster. The question there was as to the right of the state to practically confiscate the property of a corporation already in the state, rather than the right to enter the state in the first instance. The only question determined was that the company was not obliged to file under the conditions prescribed by the Kansas statutes and could not be ousted from the state for failure to file. A similar question was involved in *Pullman Co. v. Kansas*, 216 U. S. 56, 54 L. Ed. 378, 30 Sup. Ct. Rep. 232.

In considering the decision in the *Telegraph Company Case*, it is also proper to keep in mind the Act of Congress (14 Stats. at Large, 221), relating to the use of telegraph lines for postal, military and other purposes. This distinction was considered by this court in *State v. Western Union Tel. Co.*, 43 Mont. 445, 117 Pac. 93. None of these federal decisions denied to the state the right to prescribe conditions and limitations under which a foreign corporation may enter the state for the purpose of doing intrastate business. Still less do they deny the right of the state to prescribe the fee for filing an instrument which the corporation insists upon having filed with the state officer.

*Messrs. Gunn, Rasch & Hall*, for Respondent, submitted a brief; *Mr. Carl Rasch* argued the cause orally.

The questions presented were submitted to the court below upon an agreed statement of facts, and judgment rendered for respondent, upon the authority of the following cases, decided by the supreme court of the United States, sustaining respondent's contention: *Western Union Tel. Co. v. State*, 216 U. S. 1, 54 L. Ed. 355, 30 Sup. Ct. Rep. 190; *Pullman Co. v. State*, 216 U. S. 56, 54 L. Ed. 378, 30 Sup. Ct. Rep. 232; *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146, 54 L. Ed. 423, 30 Sup. Ct. Rep. 280; *International Text-Book Co. v. Pigg*, 217 U. S. 91, 18 Ann. Cas. 1103, 27 L. R. A., n. s., 493, 54 L. Ed. 678, 30 Sup. Ct. Rep. 481. In addition to the many cases reviewed and referred to in the decisions above mentioned, we cite the following, which are to the same effect: *McNaughton v. McGirl*, 20 Mont. 124, 63 Am. St. Rep. 610, 38 L. R. A. 367, 49 Pac. 651; *State v. Northern Pacific Express Co.*, 27 Mont. 419, 94 Am. St. Rep. 824, 71 Pac. 404; *State v. Western Union Tel. Co.*, 43 Mont. 445, 117 Pac. 93; *San Bernardino v. Southern Pacific Co.*, 107 Cal. 524, 29 L. R. A. 327, 40 Pac. 796; *San Francisco v. Western Union Tel. Co.*, 96 Cal. 140, 17 L. R. A. 301, 31 Pac. 10; *State v. Woodruff Sleeping & Parlor Coach Co.*, 114 Ind. 155, 15 N. E. 814; *State v. Canada Cattle Car Co.*, 85 Minn. 457, 89 N. W. 66; *United States Express Co. v. Hemmingway*, 39 Fed. 60; *United States Express Co. v. Allen*, 39 Fed. 712; *Clyde S. S. Co. v. Charleston*, 76 Fed. 46; *St. Clair County v. Interstate Car Transfer Co.*, 109 Fed. 741.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The Chicago, Milwaukee and St. Paul Railway Company is a railroad corporation, organized and existing under the laws of the state of Wisconsin, having a capital stock of \$232,623,100. It is engaged in the operation of its railroad, as a common carrier of passengers and freight, in and through the states of Wisconsin, Minnesota, Iowa, South Dakota, and other states. The

Chicago, Milwaukee and Puget Sound Railway Company, a railroad corporation organized and existing under the laws of the state of Washington, is likewise a common carrier of passengers and freight in and through the states of Washington, Idaho, Montana, and to the Missouri river in the state of North Dakota, where the lines of the two companies connect. The St. Paul Company, desiring and being about to purchase the railroad property of the Puget Sound Company, for the purpose of availing itself of the benefits of section 4299 of the Revised Codes of Montana, which requires the filing of its charter or articles of incorporation with the secretary of state, tendered to him for filing a true copy of its articles of incorporation, and also the sum of \$1 in payment of the filing fee. The secretary of state refused to receive and file the articles upon the tender so made, but demanded payment of a fee amounting to \$23,447.31, basing his demand upon the requirements of the provisions of section 165 of the Revised Codes. Upon his refusal to receive and file the articles without such payment, the amount so demanded was paid, under protest, however, with notice that an action would be brought to recover it back, on the grounds that said section 165, to the extent that it authorizes and requires the secretary of state to charge and collect a fee for the filing of articles of incorporation on the basis of a percentage of the entire capital stock of the St. Paul Company, is in conflict with and repugnant to the commerce clause of the Constitution of the United States, in that it imposes a tax upon the interstate business of the company; and that the exaction and collection of the fee in question amounted to a taking of property without due process of law, in violation of the Fourteenth Amendment to the Constitution. The cause was submitted to the district court upon an agreed statement of facts sufficient in detail to present the questions raised by the position assumed by the plaintiff. The district court held the statute void, and rendered judgment for the plaintiff. The defendant has appealed.

Section 4299, *supra*, provides, among other things, that "any railroad company may sell or lease the whole or any part of its

railroad or branches within this state constructed or to be constructed, together with all property and rights, privileges and franchises pertaining thereto, to any railroad company organized or existing pursuant to the laws of the United States or of any state or territory of the United States; \* \* \* and the railroad company of any other state or territory of the United States which shall so purchase or lease a railroad, or any part thereof in this state, or shall extend or construct its road or any portion or branch thereof in this state, shall possess and may exercise and enjoy, as to the control, management and operation of the said road, and as to the location, construction and operation of any extension or branch thereof, all the rights, powers, privileges and franchises possessed by railroad corporations organized under the laws of this state, including the exercise of the power of eminent domain: \* \* \* Provided, further, that before any railroad corporation organized under the laws of any other state or territory or of the United States shall be permitted to avail itself of the benefits of this Act, such corporation shall file with the secretary of state a true copy of its charter or articles of incorporation." The part of section 165, the validity of which [1] is brought in question, is the following: "The secretary of state, for services performed in his office, must charge and collect the following fees: \* \* \* IV. For recording and filing each certificate of incorporation and each certificate of increase of capital stock, the following amounts shall be charged: Amounts up to \$100,000, fifty cents per thousand dollars. Additional from \$100,000 to \$250,000, forty cents per thousand dollars. Additional from \$250,000 to \$500,000, thirty cents per thousand dollars. Additional from \$500,000 to \$1,000,000, twenty cents per thousand dollars. Additional over \$1,000,000, ten cents per thousand dollars. \* \* \* X. For filing each certified copy of charter or articles of incorporation of any foreign corporation, the same fee shall be charged as is provided for in Article IV of this section, for domestic corporations."

The question submitted for decision is whether section 165 is invalid for either or both reasons assigned by the plaintiff. In

support of their contentions counsel for plaintiff cite *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 54 L. Ed. 355, 30 Sup. Ct. Rep. 190, later approved by the same court in *Pullman Co. v. Kansas*, 216 U. S. 56, 54 L. Ed. 378, 30 Sup. Ct. Rep. 232; *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146, 54 L. Ed. 423, 30 Sup. Ct. Rep. 280, and *International Text-Book Co. v. Pigg*, 217 U. S. 91, 18 Ann. Cas. 1103, 27 L. R. A., n. s., 493, 54 L. Ed. 678, 30 Sup. Ct. Rep. 481. These cases, particularly the first, are directly in point. In the first there was brought in question the validity of a provision of the General Laws of the state of Kansas, which, besides requiring a corporation seeking to engage in business in the state of Kansas, after having secured permission from the state charter board upon formal application made for that purpose, also required it to "pay to the state treasurer of Kansas, for the benefit of the permanent school fund, a charter fee of one-tenth of one per cent of its authorized capital upon the first one hundred thousand dollars of its capital stock, or any part thereof; and upon the next four hundred thousand dollars, or any part thereof, one-twentieth of one per cent; and for each million or major portion thereof over and above the sum of five hundred thousand dollars, two hundred dollars." (Gen. Stats. Kan. 1901, sec. 1264.) In an elaborate opinion by Mr. Justice Harlan, in which there is an extensive review of the prior decisions of the court upon the same or analogous questions, the conclusion was reached that it is not competent for a state legislature to require a foreign corporation engaged in interstate commerce, as a condition precedent to its beginning or continuing to do business in that state, to pay a given per cent of its capital stock, representing all of its business everywhere within and outside of the state, because (1) it operates as a burden and tax on the interstate business of the corporation, in violation of the commerce clause of the Constitution, and (2) because it is a tax upon the property of the corporation beyond the limits of the state, inconsistent with the due process of law enjoined by the Fourteenth Amendment.

It is true that the method prescribed for ascertaining the tax imposed by section 165, *supra*, is a charge of a fixed number of cents per \$1,000 of the par value of the capital stock, graduated in proportion to the amount of the capital stock; whereas, under the Kansas statute, up to \$400,000 it was to be calculated by a graduated percentage, and thereafter at a uniform fixed sum per \$1,000,000. This divergence in method, however, is immaterial. The vice of such legislation, as the reasoning of the court shows, consists in the nature of the burden imposed by it, and not in the amount. The method adopted for the ascertainment of the amount cannot be material, so long as the result is the same. This is apparent from the decision in *Ludwig v. Western Union Tel. Co.* In this case was brought in question the validity of a statute of the state of Arkansas, the purpose and effect of which was the same as that of the Kansas statute, *supra*. It required the payment of a license tax upon the whole of the capital stock of both domestic and foreign corporations, to be ascertained by a charge of a fixed sum, the amount of which was graduated according to the amount of the capital stock. It was held open to the same objection as was the Kansas statute. The case of *Pullman Co. v. Kansas*, and that of *International Text-Book Co. v. Pigg*, involved other provisions of the Kansas statute; but in both the court approves the decision in *Western Union Tel. Co. v. Kansas* as the settled law on the subject, and in the latter of them expressly declares that section 1283 of the General Statutes of Kansas, which required foreign corporations engaged in interstate commerce, as a condition precedent to doing business in the state, to obtain a license, was invalid under the commerce clause of the Constitution.

This court is concluded by these decisions, and hence must [2] declare section 165, *supra*, in so far as it applies to foreign corporations seeking to engage in interstate commerce in this state, inoperative and void.

Some effort was made by counsel for appellant to maintain the contention that in each of the cases cited the question involved was whether the corporations which were already doing busi-

ness in a state should be excluded therefrom; whereas in this case the question is whether a corporation shall be permitted to come into this state to engage in business. A reading of these cases, however, leads to the conclusion that this difference in the situation of the parties cannot affect the result.

The judgment is affirmed.

*Affirmed*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

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RAICHE, RESPONDENT, v. MORRISON, APPELLANT.

(No. 3,213.)

(Submitted February 17, 1913. Decided March 19, 1913.)

[130 Pac. 1074.]

*Contracts—Breach—Nominal Damages—Options—Theory of Case.*

Options—Effect of Acceptance.

1. An option, whether based upon a consideration or not, ripens into a binding contract if accepted during its life by the promisee.

Contracts—Breach—Plaintiff Entitled to Nominal Damages, When.

2. Proof of the breach of a contract is proof of a wrong for which the injured party is entitled to recover nominal damages.

Appeal—Theory of Case.

3. The theory upon which a case was tried in the district court with the acquiescence of the parties is binding upon them on appeal; hence, the court may not be put in error for any action during its course, even though such theory was wholly erroneous, unless timely objection was made thereto.

*Appeal from District Court, Cascade County; J. B. Leslie, Judge.*

ACTION by J. A. Raiche against J. R. Morrison. Judgment for plaintiff. Defendant appeals from it and an order denying his motion for a new trial. Affirmed.

Mr. W. S. Towner, for Appellant, submitted a brief and argued the cause orally.

*Mr. W. B. Sands* submitted a brief in behalf of Respondent and argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The plaintiff heretofore brought an action in the district court of Chouteau county to recover upon the same cause of action alleged in the complaint herein. The court sustained a general demurrer to the complaint, and rendered judgment for the defendant for his costs. On appeal to this court this judgment was reversed. (*Raiche v. Morrison*, 37 Mont. 244, 95 Pac. 1061.) When the cause was remanded to the district court, the plaintiff dismissed it and brought a second action in the district court of Cascade county, where the defendant now resides. The defendant having filed his answer, a trial was had which resulted in a verdict and judgment for the plaintiff. The defendant has appealed from the judgment and an order denying his motion for a new trial. The complaint is substantially a copy of that considered on the former appeal. A statement of the allegations constituting plaintiff's cause of action will be found in the opinion thereon delivered. They need not be restated here.

In his answer the defendant denied that the contract to repurchase the stock was executed and delivered to plaintiff in consideration of the sale to him of the stock and as an inducement to the purchase as alleged in the complaint, or upon any consideration, or that plaintiff had suffered any damage by reason of defendant's failure to comply with the terms thereof. He admitted all the other allegations in the complaint. The contention is now made that the evidence is insufficient to justify the verdict. On the former appeal the contract here in question was classed as an option contract, or an option, and we think this characterized it correctly. Under the rule applicable to such contracts, when the option to buy or sell is based upon a consideration moving to the promisor, the promisee has the exclusive right to sell or buy during the time specified in the contract. He may or may not exercise his option, yet the contract is



[1] binding upon the promisor. If not based upon a consideration, it may be withdrawn at the will of the promisor; nevertheless it is a standing offer which may be accepted by the promisee at any time during its life, and thus become a contract binding upon both parties. (*Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695, and cases cited.) If we regard defendant's promise either as based upon a consideration—that is, made as an inducement to the plaintiff to purchase the stock—or as a continuing offer to repurchase made without any consideration, it became binding upon him when the plaintiff, at the date at which the option was to expire, accepted it and tendered the stock. The rule thus stated was distinctly recognized in the decision upon the former appeal holding the complaint sufficient, as is made clear by the authorities cited, though, perhaps, more importance was attached to the question of consideration than the allegations in the pleading required.

This brief statement, by way of preliminary, of our view of the rule of law applicable, clears the way for the determination of the contentions made by counsel for defendant. He insists that the evidence is insufficient to sustain the verdict, (1) in that it does not show that there was any consideration for the option; and (2) in that it fails to show that plaintiff suffered any damage. At the commencement of the trial, after a colloquy between the court and counsel, it was determined that, in view of the admissions in the answer, the burden of proof was upon the defendant to show want of consideration. Thereupon counsel for defendant introduced his evidence, which consisted of the testimony of the defendant himself, in connection with the option contract and a receipt for the purchase price of the stock, introduced as exhibits. While he testified that the option was not given until two or three days after the sale and was the result of subsequent negotiations wholly disconnected with the sale, it appears that the receipt and option both bear the same date, *viz.*, September 18, 1903, the day upon which the sale was made. This fact he did not undertake to explain. His testimony was in several respects self-contradictory and confused. The plain-

tiff, who resides in the state of Wisconsin, was not present, and his testimony was not introduced. His counsel, called in rebuttal, testified that he notified the defendant of the plaintiff's acceptance of the option, and that in an interview had with him a short time afterward the defendant admitted that, in order to induce the plaintiff to buy the stock and as a part of the consideration for the purchase, he had agreed to repurchase it at the end of three years at the price named in the option, and that at that time he intended to make his promise good, but had not done so because he had not been retained as manager of the corporation, the capacity in which he was acting at that time, as he then expected. Under these circumstances, we do not think that we ought to say that the jury arbitrarily disregarded the defendant's testimony as unworthy of credit, or that the court erred in accepting their conclusion in overruling the motion for a new trial. (*Whalen v. Harrison*, 26 Mont. 316, 67 Pac. 934; *State v. Willette*, 46 Mont. 326, 127 Pac. 1013.)

In considering this feature of the case, we have proceeded upon the assumption that the question of consideration was a material issue, requiring the introduction of evidence and a finding by the jury thereon. Under the allegations made in the complaint which were admitted in the answer, this was not necessary. It is admitted that the option was given by the defendant, and that it was accepted at the expiration of the time limit named, with a tender of the stock by the plaintiff which was refused by the defendant. It is apparent, therefore, that plaintiff would have been entitled to a judgment on the pleadings for nominal damages; for proof of the breach of a contract is proof of a wrong for which the injured party is entitled to recover nominal damages. (13 Cyc. 17.)

No evidence was introduced by either party as to the value of the stock at the time the plaintiff accepted the option, or at any time before or after that time, other than a statement made by the defendant when counsel for plaintiff tendered him the stock and demanded payment of the purchase price. The latter testified that the defendant, upon refusing to accept it, said:

"You can just as well keep it because it is worthless. It makes no difference who keeps it, whether I have to pay for it or not." Viewing this as an admission against interest, it was some evidence tending to show that the stock was valueless. We shall not stop to consider whether it would have sustained a finding of the jury that the stock had no value. The court and counsel both proceeded upon the theory that, if the question of consideration should be resolved in favor of the plaintiff, he would be entitled to recover the full amount of the price fixed in the option, viz., \$1,720. In other words, court and counsel proceeded upon the assumption that the stock was valueless, and that plaintiff, if entitled to recover at all, should recover the option price. Accordingly, the court instructed the jury, in substance, without objection by counsel for defendant, that if at the time of the purchase of the stock by plaintiff, and as a part of the transaction and as an inducement to lead the plaintiff to make the purchase, the defendant made the agreement contained in the option to repurchase within three years at the price of \$1,720, they should return a verdict for this amount in favor of the plaintiff. Let it be conceded that this theory of the case [3] was wholly erroneous; nevertheless, counsel having accepted and acted upon it and permitted the court to do so without objection, he cannot now complain that his client has suffered prejudice. A party cannot be permitted to assume in this court a position different from that assumed in the trial court in order to predicate error upon any action of that court during the course of a trial to which he did not make timely objection in that court. (*Chüds v. Ptomey*, 17 Mont. 502, 43 Pac. 714; *Newell v. Nicholson*, 17 Mont. 389, 43 Pac. 180; *Maul v. Schultz*, 19 Mont. 335, 48 Pac. 626; *Durfee v. Harper*, 22 Mont. 354, 56 Pac. 582; *Hendrickson v. Wallace*, 29 Mont. 504, 75 Pac. 355; *Dempster v. Oregon S. L. Ry. Co.*, 37 Mont. 335, 96 Pac. 717.)

Counsel has devoted much space in his brief to a discussion of the measure of damages which he insists the court should have given to the jury. We agree with him that the rule prescribed

by section 6081 of the Revised Codes, applied in *Welch v. Nichols*, 41 Mont. 435, 110 Pac. 89, should have been followed in this case; but for the reason already stated we do not think counsel is now in position to allege prejudice because the court failed to do so.

The judgment and order are affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

HERSEY, RESPONDENT, v. NEILSON ET AL., APPELLANTS.

(No. 3,288.)

(Submitted February 18, 1913. Decided March 19, 1913.)

[131 Pac. 30.]

*Counties—Not Municipal Corporations—Printing Contracts—Statute—Constitutionality—Indirect Taxation—Local or Special Laws—Regulation of Interstate Commerce—Due Process of Law.*

Counties—Not Municipal Corporations.

1. *Held*, that only incorporated cities and towns are municipal corporations in this state, and that therefore counties may not be classed as such.

Same—Definition—Legislative Control.

2. A county is a political subdivision of the state for governmental purposes; as such they are subject to legislative power, except in so far as it is restricted by the Constitution in express terms or by necessary implication.

Same—Printing Contracts—Limit of Powers.

3. Under section 2870, Revised Codes, a county has only such powers as are expressly conferred by law or necessarily implied from those expressed; hence a board of commissioners—its executive body—whose authority to let a public printing contract is questioned, must justify its action by reference to the provisions of law defining and limiting its powers in this respect.

Same—Printing Contracts—Manner of Letting.

4. The manner in which county printing contracts shall be let is one of legislative or governmental policy, with which courts may not interfere.

Same—Constitutionality of Statute—Due Process of Law.

5. *Held*, that section 2897, Revised Codes, providing that county printing must be done within the state, is not repugnant to either the

Fifth or Fourteenth Amendment to the Constitution of the United States, relative to deprivation of property without due process of law, or to section 3, Article III, Montana Constitution, having to do with the inalienable right of acquiring property.

Same—Statutes—Constitutionality—Record.

6. In the absence of a showing that in its operation section 2897, Revised Codes, imposes upon the taxpayers a burden greater than they would have to bear if outside competition were permitted, and thus indirectly operates as a tax upon the inhabitants of counties, contrary to section 4, Article XII, of the Constitution, its constitutionality in that regard will not be determined.

Same—Statute—Local or Special Laws—Constitution.

7. Since section 2897, Revised Codes, requiring county printing to be done within the state, applies to all counties and to all county printing contracts, it is neither a local nor a special statute, and therefore does not do violence to section 26, Article V, of the state Constitution prohibiting the enactment of either.

Same—Constitution—Regulation of Interstate Commerce.

8. Section 2897, Revised Codes, making it incumbent upon counties to have their public printing done within the state, *held*, not a regulation of interstate commerce contrary to the clause in section 8 of Article I of the federal Constitution.

*Appeal from District Court, Hill County; J. E. Erickson, Judge of the Eleventh Judicial District, presiding.*

ACTION by P. H. Hersey against Ever Neilson and others, county commissioners, and J. A. Rose, county treasurer, of Hill county, Montana. Judgment for plaintiff and defendants appeal. Affirmed.

*Messrs. Gunn, Rasch & Hall, and Messrs. W. W. Patterson, H. S. Kline, and Victor R. Griggs, for Appellants, submitted a brief; Mr. M. S. Gunn argued the cause orally.*

It is our contention that a county is a municipal corporation, having governmental and proprietary functions; that as to the former, the state's control is supreme, but as to the latter, the state's control is no more extensive than it is over private corporations; that county printing is a matter solely of local concern; and comes within the proprietary functions of a county, and that section 2897 is an unconstitutional restriction upon the power of a county to contract as to its local affairs, and void. In *Independent Pub. Co. v. Lewis and Clark*, 30 Mont. 83, 75 Pac. 860, this court said: "It [the county] is *quasi* corporate in character \* \* \*"; and in *State v. Coad*, 23 Mont. 131, 57

Pac. 1092, it was held that as a county derives its powers from the same source as a municipal corporation, it comes within the rules and principles of law applicable to such corporation. (See, also, *State v. Varney Electrical Supply Co.*, 160 Ind. 338, 98 Am. St. Rep. 325, 61 L. R. A. 154, 66 N. E. 895; *People v. Hurlbut*, 24 Mich. 87.) Furthermore, section 30 of Article III of our state Constitution provides: "The enumeration in this Constitution of certain rights, shall not be construed to deny, impair or disparage others retained by the people." (See, also, 1 Dillon on Municipal Corporations, 5th ed., sec. 109; *Hunter v. Pittsburg*, 207 U. S. 161, 52 L. Ed. 151, 28 Sup. Ct. Rep. 40; *State v. Barker*, 116 Idaho, 96, 93 Am. St. Rep. 222, 57 L. R. A. 244, 89 N. W. 204.)

County printing is a private, and not a governmental, function. If the establishment, maintenance and control of a waterworks, gas plant and fire department are matters of local concern to towns and cities, over which the state has no control, as held in the cases *infra*, it must follow that county printing is a matter of local concern to a county and its taxpayers, and that the county's control over it cannot be interfered with by the state. (*Helena Cons. Water Co. v. Steele*, 20 Mont. 1, 37 L. R. A. 412, 49 Pac. 382; *People v. Common Council of Detroit*, 28 Mich. 228, 15 Am. Rep. 206; *Davidson v. Hine*, 151 Mich. 294, 123 Am. St. Rep. 267, 14 Ann. Cas. 352, 15 L. R. A., n. s., 575, 115 N. W. 246; *City of South Pasadena v. Pasadena County etc. Co.*, 152 Cal. 579, 93 Pac. 490; *State v. Moores*, 55 Neb. 480, 41 L. R. A. 624, 76 N. W. 175.)

The statute violates the Fifth and Fourteenth Amendments to the Constitution of the United States, and section 3 of Article III of the Constitution of the state of Montana (*Van Harlingen v. Doyle*, 134 Cal. 53, 54 L. R. A. 771, 66 Pac. 44; *People v. Coler*, 166 N. Y. 1, 82 Am. St. Rep. 605, 52 L. R. A. 814, 59 N. E. 716; *Adams v. Brennan*, 177 Ill. 194, 96 Am. St. Rep. 222, 42 L. R. A. 718, 52 N. E. 314; *Marshall & Bruce Co. v. Nashville*, 109 Tenn. 495, 71 S. W. 815); for it is well settled that the right to contract is property within the meaning of the Fourteenth

Amendment (*Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. Ed. 832, 17 Sup. Ct. Rep. 427, and *Butchers' etc. Co. v. Crescent City etc. Co.*, 111 U. S. 746, 28 L. Ed. 585, 4 Sup. Ct. Rep. 652), and a county comes within the protection of the above provisions of these constitutions. (*Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 694, 4 L. Ed. 629; *Ex parte Case*, 20 Idaho, 128, 116 Pac. 1037; *Street v. Varney Electrical Supply Co.*, *supra*.)

The provision of section 2897 we are attacking increases the cost of printing to counties, in that the newspapers to which the contracts are awarded are permitted to sublet them only to newspapers or printing establishments within the state, and outside competition is thereby eliminated, and it is manifest, therefore, that it results in taking a portion of the money paid by the taxpayers of Hill county for county printing which might be saved, and is, in effect, taxing the county inhabitants, and as a legislature cannot do indirectly what it cannot do directly, the law is in flagrant violation of section 4 of Article XII of the state Constitution. (*People v. Coler*, *supra*; *Marshal & Bruce Co. v. Nashville*, 109 Tenn. 495, 71 S. W. 815; *State v. Eldredge*, 27 Utah, 477, 76 Pac. 337.)

If the legislature has power to require counties to stipulate in their contracts for printing that the contracts shall be sublet only to newspapers or printing establishments within the state, then, by a parity of reasoning, the legislature has power to restrict counties in getting any of their supplies to such classes as it may please the whim of the legislature to create. If there is any reason underlying this law, the law should apply to all contracts let by counties. The law, as it stands, is special and not uniform in operation, and therefore violative of section 26, Article V, of the state Constitution. (See *Van Harlingen v. Doyle*, 134 Cal. 53, 54 L. R. A. 771, 66 Pac. 44; *Eden v. People*, 161 Ill. 296, 52 Am. St. Rep. 365, 32 L. R. A. 659, 43 N. E. 1108; *State v. Trenton*, 54 N. J. L. 444, 24 Atl. 478; *State v. Gantz*, 124 La. 535, 24 L. R. A., n. s., 1072, 50 South. 524; *Davies v. Board of Supervisors*, 89 Mich. 295, 50 N. W. 862; *Stratman v.*

*Commonwealth*, 137 Ky. 500, 136 Am. St. Rep. 299, 27 L. R. A., n. s., 949, 125 S. W. 1094.)

The provision of section 2897, in preventing counties from having their printing done and their printing supplies furnished by concerns outside of the state, interferes with interstate commerce. (*People ex rel. Treat v. Coler*, 166 N. Y. 144, 59 N. E. 776; *People v. Buffalo Fish Co.*, 164 N. Y. 93, 79 Am. St. Rep. 622, 52 L. R. A. 803, 58 N. E. 34.) The law is, therefore, in violation of section 8 of Article I of the Constitution of the United States, which provides: "Congress shall have power \* \* \* to regulate commerce among the several states."

*Mr. C. A. Spaulding* submitted a brief and argued the cause orally in behalf of Respondent.

The argument of counsel for appellants is premised upon the erroneous assumption that counties are municipal corporations, and as such fall within the rule announced by many authorities that in some matters of local self-government they are independent of state control. But counties in Montana are mere political subdivisions of the state; in truth, they are political agencies of the state by means of which the policies of the state are more effectively carried out locally. They are not clothed with the right to make laws for local self-government, nor indeed to do aught except carry out the will of the state as expressed in the statutes creating them, which are the measure of their powers. Municipalities, on the contrary, are given authority to make laws to effectuate local self-government; and as to those matters regarding which such municipalities are given that authority, they act in a private and proprietary capacity, and hence stand in the same relation to the law as private corporations. This distinction between counties, which, at the most, are only *quasi* corporations, and cities which are municipal corporations proper, has been consistently adhered to, and pointed out in decisions of the courts not only of this jurisdiction, but in practically every other jurisdiction within the United States, and by the federal courts as well. (*State v. Coad*, 23 Mont. 131, 57 Pac.



1092; *Independent Pub. Co. v. Lewis and Clark County*, 30 Mont. 83, 75 Pac. 860; *Morse v. Granite County*, 44 Mont. 78, 119 Pac. 286; *People v. Sacramento County*, 45 Cal. 692; *People v. McFadden*, 81 Cal. 489, 15 Am. St. Rep. 66, 22 Pac. 851; *Yamhill County v. Foster*, 53 Or. 124, 99 Pac. 286; *Commissioners of Hamilton County v. Mighels*, 7 Ohio St. 109; *Board of Commrs. of Montezuma Co. v. Wheeler*, 39 Colo. 207, 89 Pac. 52; *Frantz v. Autry*, 18 Okl. 561, 91 Pac. 211; *Silver v. Board of Commrs. of Clay Co.*, 76 Kan. 228, 91 Pac. 55; *Rogers Locomotive Machine Works v. American Emigrant Co.*, 164 U. S. 559, 41 L. Ed. 552, 17 Sup. Ct. Rep. 188.)

As indicative of the complete control possessed by the state over counties as political subdivisions thereof, numerous adjudicated cases hold that even the revenues of a county are wholly and absolutely under legislative control (*McSurely v. McGrew*, 140 Iowa, 163, 132 Am. St. Rep. 248, 118 N. W. 415; *Raymond v. Hartford Fire Ins. Co.*, 196 Ill. 329, 63 N. E. 745), where the distinction between the authority possessed by a state over the revenues of a municipal corporation such as a city and those of a county is clearly indicated. (See, also, *Slutts v. Dana*, 138 Iowa, 244, 115 N. W. 1115; *Swartz v. Lake County Commrs.*, 158 Ind. 141, 63 N. E. 31.) The true rule being that announced by the foregoing authorities and it being well settled that counties are merely governmental agencies for carrying out the policies of the state, it is apparent that whatever policy the state declares, or whatever limitation it prescribes as a condition precedent to such agents carrying on its business, the agent is bound by and must conform to.

Appellants do not indicate in their brief wherein section 3, Article III, of the state Constitution relates to counties. It is true the courts have held that the word "persons," used in constitutional provisions, is comprehensive enough to include private corporations; but no court has ever held that the word "persons" so used is applicable to governmental agencies of the state such as counties. The same may be said regarding the Fifth and Fourteenth Amendments to the Constitution of the United

States. Those amendments relate only to "persons" as defined by the courts, and not to political subdivisions of the state such as counties.

Appellants further contend that said section 2897 violates section 4 of Article XII of the state Constitution, which prohibits the legislative assembly from levying taxes upon the inhabitants or property in any county, city or town, for county, town or municipal purposes. Merely providing that in any contract let for county printing the commissioners shall require any subletting to be to some establishment within the state is not levying a tax; it is prescribing the manner in which a county contract shall be sublet. It has no more to do with the levy of taxes than the analogous provision of the statute that the board must advertise and let its contracts for the care of the poor of the county to the lowest responsible bidder. All of the cases cited by appellants under this subdivision of their brief are not in point.

Again, it is contended that said section 2897 violates the provisions of section 26 of Article V of the state Constitution, which prohibits the passing of local or special laws in certain enumerated cases. The claim is made that section 2897 falls within the purview of this constitutional provision, in that it assumes to regulate county affairs. The answer to this is that even if it does regulate county affairs, it is a general and not a special law; and it is only "local or special laws" which fall within the inhibition of this section of the Constitution. Section 2897 is a statute applicable to all the counties of the state; it is uniform in its scope and operation, and is in no sense whatever a local or special law.

Counsel for appellants cite but two cases to sustain the contention that the statute violates the interstate commerce clause of the Constitution. One is the case of *People v. Buffalo Fish Co.*, 164 N. Y. 93, 79 Am. St. Rep. 622, 52 L. R. A. 803, 58 N. E. 34, holding that the state cannot lawfully prescribe that one "being possessed" of certain kinds of fish at a certain season of the year is guilty of a public offense, when, as a fact, such fish were shipped into the state from another jurisdiction. This

would seem to have very little to do with the principle under discussion. The second case is that of *People ex rel. Treat v. Coler*, 166 N. Y. 144, 59 N. E. 776, holding that a statute imposing upon a municipal corporation the restriction that it should purchase no dressed or carved stone unless the work done thereon was performed within the state is invalid. This latter case is easily distinguishable from the case at bar. There the restriction was sought to be imposed upon a municipal corporation, which, under well-established principles, stands in a relation to the law wholly different from that of a county, as the many authorities heretofore cited demonstrate. The only reason why section 2897 could be said to violate the interstate commerce clause of the federal Constitution is that it denies to citizens of other states the right to contract for county printing within this state. But the same question was raised in the case of *Atkin v. Kansas*, 191 U. S. 207, 48 L. Ed. 148, 24 Sup. Ct. Rep. 124, and answered adversely to plaintiff in that case. Nor is direct authority lacking that such a statute as section 2897 does not violate the interstate commerce clause. The right of the state to require the printing done for it or any of its municipal subdivisions to be done within the state cannot admit of doubt. It was expressly so ruled in the somewhat recent case of *In re Gemmill*, 20 Idaho, 732, Ann. Cas. 1913A, 76, 119 Pac. 298.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On March 8, 1912, the board of county commissioners of Hill county, Montana, let a contract to B. B. Weldy, proprietor and publisher of the "Chester Signal," a newspaper which had been published in Hill county for more than six months prior thereto, to do the county printing, including the furnishing of blanks, blank books, etc. Thereafter Weldy sublet to the Shaw-Borden Company, of Spokane, Washington, the contract to furnish all blank record books, warrant books, certificate books, registers, and bound books of every description to be used by the county.

This action was commenced by a resident taxpayer to secure an injunction restraining the board of county commissioners from allowing the account of Weldy for supplies furnished through the Shaw-Borden Company, or from directing a county warrant to be issued to pay for such supplies, and to restrain the county treasurer from paying for such supplies. Upon the complaint a temporary injunction was issued. The defendants demurred to the complaint and moved to dissolve the injunction. The demurrer was overruled, and the motion to dissolve denied. Defendants thereupon stood upon their demurrer, suffered judgment to be entered against them, and have appealed.

It is insisted that section 2897 of the Revised Codes is unconstitutional, and this presents the only question for our determination. After providing for letting public printing contracts, that section of the Codes proceeds: "All newspapers which may receive any contract for printing under this Act which may not be able to execute any part of such contract shall be required to sublet such contract or portion of contract to some newspaper or printing establishment within the state, which may be competent to execute such work. \* \* \* "

1. In their brief counsel for appellants attack the statute, and say: "It is our contention that a county is a municipal [1] corporation, having governmental and proprietary functions; that as to the former the state's control is supreme, but as to the latter the state's control is no more extensive than it is over private corporations; that county printing is a matter solely of local concern, and comes within the proprietary functions of a county, and that the above provision of section 2897 is an unconstitutional restriction upon the power of a county to contract as to its local affairs." If the statement, "a county is a municipal corporation, having governmental and proprietary functions," is true, the conclusion announced above might follow. But we are not able to agree with counsel that the premise states correctly any rule of law.

The word "municipal" means "pertaining to a city or a community within a state, possessing rights of self-government."

(Anderson's Law Dictionary.) It is derived from the Latin "*municipalis*," which in its origin referred to a town possessing the rights of Roman citizenship and governed by its own laws; in other words, to a free town. (Webster's International Dictionary.) A municipal corporation is "a public corporation created by government for political purposes and having subordinate and local powers of legislation." (Bouvier's Law Dictionary.) Every authority on municipal law makes clear the distinction between a municipality and a county, as the word "county" is used in the Constitution and statutes of this state. In 1 Dillon on Municipal Corporations, fifth edition, section 32, the author says: "We may therefore define a municipal corporation in its historical and strict sense to be the incorporation by the authority of the government of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate, specified powers of legislation and regulation with respect to their local and internal concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper." And again, in section 34: "All corporations intended as agencies in the administration of civil government are public, as distinguished from private corporations. Thus an incorporated school district, or county, as well as a city, is a public corporation; but the school district or county, properly speaking, is not, while the city is, a municipal corporation."

That the framers of our Constitution did not intend municipal corporations to include counties is clear, for the two terms are used to distinguish different organizations (sec. 6, Art. XVI; sec. 4, Art. XIII; *People v. McFadden*, 81 Cal. 489, 15 Am. St. Rep. 66, 22 Pac. 851). A county is a body corporate (sec. 2870, Rev. Codes), so, likewise, is a school district (section 848); but neither possesses the powers of local legislation and control which are the distinguishing characteristics of a municipal corporation. (*State v. Leffingwell*, 54 Mo. 458; *State v. Barker*, 116 Iowa, 96, 93 Am. St. Rep. 222, 57 L. R. A. 244, 89 N. W. 204; *Memphis T.*

*Co. v. Board of St. Francis Levee Dist.*, 69 Ark. 284, 62 S. W. 902.)

Because of its autonomous character—its enjoyment of a large measure of organic independence—the municipal corporation is relieved to a considerable extent from officious, meddlesome legislation which seeks to interfere with its private or proprietary functions. The theory of local self-government for municipal corporations is firmly established in this state. (*Helena Con. Water Co. v. Steele*, 20 Mont. 1, 37 L. R. A. 412, 49 Pac. 382; *State ex rel. Gerry v. Edwards*, 42 Mont. 135, Ann. Cas. 1912A, 1063, 32 L. R. A. n. s., 1078, 111 Pac. 734.) But because of the difference in the character of a county and a municipality, the authorities which restrain the legislature from intermeddling with the private affairs of the municipal corporation are not in point when the question for determination is the right of the legislature to control county affairs.

“It is well-established law that a county is an involuntary corporation for governmental purposes, and is in no sense a business corporation; that the powers and obligations of the county are such only as the law prescribes or as arise by necessary implication therefrom. (*Eikenberry v. Bazaar Township*, 22 Kan. 556, 31 Am. Rep. 198; *Commrs. of Marion Co. v. Riggs*, 24 Kan. 255; 11 Cyc. 497; 7 Am. & Eng. Ency. of Law, 947.) Cities, however, in this state are municipal corporations, and neither their powers nor obligations are so restricted, and decisions as to their liability for negligence have no application here.” (*Silver v. Board of Commrs.*, 76 Kan. 228, 91 Pac. 55.)

In 1 Dillon on Municipal Corporations, section 35, the author says: “With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy.” In section 37 of the same work the distinction between municipal corporations on the one hand and political or civil divisions of the state created for administrative purposes, such as counties and school districts, on the other, is made clear. (See, also, *Shipley v. Hacheney*, 34 Or. 303, 55 Pac. 971.)

"A county is one of the civil divisions of the state for political and judicial purposes, created by the sovereign power of the state of its own will, without the consent of the people who inhabit it. (7 Am. & Eng. Ency. of Law, 2d ed., 900.) It is quasi corporate in character, but has only such powers as are expressly provided by law or are necessarily implied by those expressed." (*Independent Pub. Co. v. Lewis & Clark County*, 30 Mont. 83, 75 Pac. 860.)

In *Board of Commissioners v. Watson*, 7 Okl. 174, 54 Pac. 441, it is said: "A county is but a subordinate, political subdivision of sovereignty created for governmental purposes and for greater convenience in carrying on the public affairs."

"A county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government." (*County of San Mateo v. Coburn*, 130 Cal. 631, 63 Pac. 78.)

In speaking of a county, the supreme court of Oregon, in *Yamhill County v. Foster*, 53 Or. 124, 99 Pac. 286, said: "It is merely a political agent of the state created by law for governmental purposes, and is charged with the performance of certain duties for and on behalf of the state."

"Counties are not in any respect business corporations for private purposes; nor are they organized exclusively for the common benefit of citizens and property holders within their respective limits. They are of a purely political character, constituting the machinery and essential agency by which free governments are upheld, and through which for the most part their powers are exercised. Their functions are wholly of a public nature. Counties are subordinate agencies for the orderly government of the state within the scope of their authority; hence they are subject to the control and direction of the legislature in which chiefly the sovereignty of the state is represented and exercised." (11 Cyc. 341.) In *State v. Board of Commissioners*, 170 Ind. 595, 85 N. E. 513, it is said: "A county is an involun-

tary corporation, organized as a political subdivision of the state by the legislature, the sovereign power, solely for governmental purposes. Such subdivisions are instrumentalities of government, and exercise the powers delegated by the state, and act for the state." In speaking upon the same subject, and to the extent of the state's control over a county, the supreme court of the United States, in *Rogers Locomotive Machine Works v. American Emigrant Co.*, 164 U. S. 559, 41 L. Ed. 552, 17 Sup. Ct. Rep. 188, said: "The county of Calhoun is a mere political subdivision of the state, created for the state's convenience, and to aid in carrying out, within a limited territory, the policy of the state. Its local government can have no will contrary to the will of the state, and it is subject to the paramount authority of the state, in respect as well of its acts as of its property and revenue held for public purposes. The state made it, and could, in its discretion, unmake it, and administer such property and revenue through other instrumentalities."

Since the enactment of Chapter 112, Laws of 1911, the involuntary character of counties in this state is somewhat modified, but the change thus wrought in the method of creating new [2] counties does not affect their status as political subdivisions of the state for governmental purposes. We think it very clear that only incorporated cities and towns are municipal corporations in this state.

Of course, the authority of the legislature over the affairs of the county is not plenary. There are certain restrictions imposed by the Constitution, for instance: "The legislative assembly shall not levy taxes upon the inhabitants or property of any county." (Sec. 4, Article XII.) But legislative power over counties is supreme, except in so far as it is restricted by the Constitution in express terms or by necessary implication. (11 Cyc. 343; *State v. McFadden*, 23 Minn. 40; *Rogers Locomotive Machine Works v. American Emigrant Co.*, above.)

In speaking of counties and their enforced submission to legislative control the supreme court of Colorado said: "They are purely auxiliaries of the state, and to the general statutes of



the state they owe their creation, and the statutes confer upon them all the powers they possess, prescribe the duties they owe, and impose the liabilities to which they are subject." (*Board of Commrs. v. Wheeler*, 39 Colo. 207, 89 Pac. 50.)

That the authority of the board of county commissioners of [3] Hill county to let a contract for county printing must be found written in the statutes, or necessarily implied, or it does not exist, is well understood. (*State ex rel. Lambert v. Coad*, 23 Mont. 131, 57 Pac. 1092.) In *Morse v. Granite County*, 44 Mont. 78, 119 Pac. 286, this court, in speaking of the authority of a county, said: "Its board of commissioners—its executive body—is a body of limited powers, and must in every instance justify its action by reference to the provisions of law defining and limiting these powers." Indeed, the Code itself (section 2870) declares the same rule: "Every county is a body politic and corporate, and as such has the power specified in this Code, or in special statutes, and such powers as are necessarily implied from those expressed." Under the doctrine of the maxim, "*Expressio unius exclusio alterius*," the county does not have any powers other than those indicated in section 2870 above. The legislature in its wisdom has seen fit to prescribe the conditions upon which its agents—the counties—may conduct county business, and in the absence of constitutional restriction the authority to do so cannot be doubted.

In determining that the legislature has power to control *the manner* in which county road work shall be done the supreme court of North Carolina said: "Counties are but agencies of the state government. They can be created, changed, or abolished at the legislative will. \* \* \* They are subject to legislative authority which can direct them to do as a duty all such matters as they can empower them to do." (*State ex rel. Tate v. Commissioners of Haywood County*, 122 N. C. 812, 30 S. E. 352. See, also, *Jones v. Commissioners*, 137 N. C. 579, 50 S. E. 291.) The [4] manner in which printing contracts shall be let is one of legislative or governmental policy, a question with which the courts have nothing to do. (*State v. Livingston Concrete B. & F. Mfg. Co.*, 34 Mont. 570, 9 Ann. Cas. 204, 87 Pac. 980.)

2. Again, counsel for appellants say: "As the provision of section 2897 under consideration bars outside competition, it prevents a county from getting the best work possible, and requires it to pay a higher price for its printing than if the newspaper to which the contract is awarded were permitted to sublet it to a printing establishment outside the state." In this instance the premise is correct, but the conclusion is unwarranted. There is not anything before us to indicate that the cost of county printing and supplies will be greater or the quality of the work poorer by reason of the restriction found in section 2897. It is admitted that there are many printing and publishing establishments within this state fully equipped and competent to supply any of the matters or things specified in Weldy's contract which he himself could not furnish; and for aught we know these Montana concerns may be willing to do the work or furnish the supplies as cheaply as any outside concern. In the absence of any showing that in its operation section 2897 imposes upon the taxpayers an arbitrary burden greater than they would otherwise have to bear, it is unnecessary to consider the effect of legislation which takes from one citizen his property and confers it upon another to swell his own private income.

We fail to see wherein the statute under consideration does [5] violence to the provisions of either the Fifth or Fourteenth Amendment to the Constitution of the United States, or section 3 of Article III of our own state Constitution.

3. Based upon the assumption that by reason of the restriction in section 2897 county printing costs more than it otherwise [6] would, counsel for appellants argue that the statute operates to take from the taxpayers a portion of the public moneys which might otherwise be saved, and thus indirectly operates to tax the inhabitants of the several counties, in violation of the provisions of section 4, Article XII, of our state Constitution. It is unnecessary to consider what the result would be if the fact which is assumed to exist had any real existence. Since there is not anything in the record to justify the assumption made, it is idle to pursue the inquiry further.

4. Again, it is insisted that the provisions of section 26, Article V, of our state Constitution, are violated by the enactment of [7] this statute, in that section 2897 is a local or special law regulating county affairs; and authorities are cited which seem to uphold the view that a statute of this character is not general or uniform in its operation. In 36 Cyc. 986, the terms "local" and "special," as applied to statutes, are defined as follows: "A special or private Act is a statute operating only on particular persons and private concerns." "A local Act is an Act applicable only to a particular part of the legislative jurisdiction." (See, also, 26 Am. & Eng. Ency. of Law, 2d ed., 532.) These definitions were approved by this court in *State ex rel. Geiger v. Long*, 43 Mont. 401, 117 Pac. 104, and we think they are correct. When we consider that section 2897 is state wide in its operation, it cannot be classed as a local statute; and, since it applies to all county printing contracts, it is not special.

5. Finally, it is insisted that the section under consideration [8] is invalid because, by preventing outside concerns from bidding upon county contracts or furnishing the counties with necessary supplies, it amounts to a regulation of interstate commerce. Two cases are cited: *People v. Buffalo Fish Co.*, 164 N. Y. 93, 79 Am. St. Rep. 622, 52 L. R. A. 803, 58 N. E. 34, and *People ex rel. Treat v. Coler*, 166 N. Y. 144, 59 N. E. 776. The first is clearly not authority in this instance. In it was considered one section of the Fish and Game Law of New York, which imposes a penalty upon anyone who has in his possession certain kinds of fish during certain periods of the year. The Buffalo Fish Company imported from Canada fish of the proscribed variety, and an action was commenced to recover the penalty. It was held that in so far as the statute affected the possession, by citizens of New York, of fish imported from a foreign country, it operated to regulate commerce between the United States and a foreign country, and was therefore void. In the second case there was called in question the validity of a statute of New York which provided that all stone, except paving blocks and crushed stone, used in state or municipal works

within the state of New York or which was to be worked, dressed, or carved for use, must be worked, dressed, or carved within the boundaries of New York state. By a divided court it was held that the citizens of other states having cut or dressed stone for sale had a right to compete in bidding for municipal work in New York, or at least had the right to sell their products to municipalities in New York state, and that the statute in question operated as a regulation of interstate commerce and was void. Parker, C. J., presented a vigorous dissenting opinion, the logic of which commends it to us.

Of course, it would not be within the power of the legislature of this state to say to an individual citizen, "You cannot have printing or bookbinding done unless you let the work to a Montana concern"; but, as Judge Parker points out in his dissenting opinion above, the state could not deny to a citizen the right to say, "I will not patronize any outside concern for my printing or bookbinding," and, if an individual or a private corporation in this state should insist that his or its printing be done by a Montana concern, no one would suggest that the right thus asserted could not be insisted upon. As we have already determined, a county is but an agency through which the state transacts a portion of its business. The state speaks through its legislature, and in our opinion has the same right that any individual citizen has to declare that it will procure its supplies, or have the supplies for one of its constituent parts procured, from a Montana concern.

In *Tribune Printing & Binding Co. v. Barnes*, 7 N. D. 591, 75 N. W. 904, the supreme court of North Dakota had for consideration a statute which provided: "All county printing shall be done in the state, and if practicable in the county ordering the same." In construing this statute the court used the following language: "Again, it is argued that if section 1807, *supra*, is construed to prohibit county officials from procuring county supplies or printed matter from those who manufacture such supplies at places without the state, it would operate to violate section 8 of Article I of the federal Constitution relating to com-

merce among the states. No authority is cited in support of this contention by counsel, and we are unaware of the existence of any such authority. Viewed as a question of principle, we are unable to see why the state is forbidden to do what an individual certainly may do with impunity, viz., elect from whom it will purchase supplies needed in the discharge of its corporate functions. If such election may lawfully be made, it certainly is competent for the state to direct its officials by a mandatory statute to procure their office supplies from those who produce the same within its own limits, it having elected to purchase none other, either for the use of the state as such, or for the use of subordinate political bodies within the state." In considering this same objection to a statute similar to our own, the supreme court of Idaho, in *In re Gemmill*, 20 Idaho, 732, Ann. Cas. 1913A, 76, 119 Pac. 298, reached the conclusion that such a statute does not operate to regulate or restrict interstate commerce. Whether the legislation under consideration is wise or otherwise is not a matter of concern at this time, but that in the absence of constitutional inhibition the legislature may impose the restriction found in section 2897 is not open to doubt. Since no provision of the Constitution has been called to our attention which restricts the legislature in its control over county affairs in the respect mentioned in this statute, our conclusion is that the section is not open to any of the objections urged against it.

The judgment of the district court is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

## MILLER, RESPONDENT, v. MILLER ET AL., APPELLANTS.

(No. 3,231.)

(Submitted March 18, 1913. Decided March 26, 1913.)

[131 Pac. 23.]

*Justices' Courts—Judgments—Presumptions—Jurisdictional Facts—Proof—Pleading Judgment as "Duly Given or Made"—Burden of Proof—Adoption of Statutes from Other State—Construction.*

**Justices' Courts—Judgment—Validity—Proof of Jurisdictional Facts Necessary—Presumptions.**

1. In an action to quiet title, defendant relied upon a sheriff's deed to the property which had been sold on execution issued under a judgment alleged to have been "duly given and made" in a justice's court; the docket of the justice, entries in which are made *prima facie* evidence of the facts stated therein by section 7071, Revised Codes, having been lost and proof of its contents found not available, defendant introduced an abstract of the judgment filed with the clerk of the district court pursuant to section 7057, as *prima facie* evidence of the validity of the judgment. *Held*, under the rule that justices' courts being courts of limited jurisdiction, the legal presumptions which may be indulged in favor of judgments of courts of record have no application to them, but that the jurisdictional facts must be made to appear affirmatively, and the abstract not being made evidence of any fact by statute, defendant failed to prove the validity of the judgment.

**Statutes—Adoption from Other States—Construction.**

2. Adoption of a statute from another state after construction by its highest court carries with it the construction thus placed upon it.

**Judgments—Pleading—"Duly Given or Made"—Burden of Proof.**

3. While under section 6571, Revised Codes, a party may plead a judgment by the abbreviated allegation that it has been "duly given or made," he is not thereby relieved of the burden of proving jurisdictional facts if the allegation is controverted.

*Appeal from District Court, Missoula County; F. C. Webster, Judge.*

Surr by John S. Miller against F. L. Miller and the Chicago, Milwaukee and Puget Sound Railway Company. Judgment for plaintiff and defendants appeal. Affirmed.

*Mr. Harry H. Parsons, and Mr. Henry C. Stiff, for Appellants, submitted a brief.*

In behalf of Respondent, *Messrs. H. G. & S. H. McIntire* submitted a brief; oral argument by *Mr. S. H. McIntire*.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This suit was brought to quiet title to certain real estate in Missoula county. The complaint is brief and sets forth the fact that the plaintiff is the owner of the land (describing it), that each of the defendants claims some interest adverse to the plaintiff, and that such claims are without foundation or right. The defendant Miller by separate answer admitted that the plaintiff was the owner in fee of the land in question on or prior to February 6, 1904. He then alleged that in December, 1903, a judgment was duly "given and made" in the court of the justice of the peace of Hell Gate township, Missoula county, in favor of H. H. Marsh and against John S. Miller, this plaintiff; that thereafter an abstract of the judgment was filed in the office of the clerk of the district court of Missoula county and the judgment duly docketed; that on February 6, 1904, execution was issued and levied upon the land above mentioned, and on March 1, the property was sold at sheriff's sale to Marsh, the judgment creditor, and a certificate of sale issued to him; that the property was not redeemed from the sale, and after the lapse of more than a year the sheriff executed and delivered to Marsh a deed for the property; that in December, 1908, Marsh sold and conveyed the property to defendant F. L. Miller, and thereafter defendant Miller sold and conveyed to the defendant railway company a strip of the ground for right of way. The separate answer of the railway company is to all intents and purposes the same as that of its codefendant Miller. The affirmative allegations in each answer were put in issue by reply. Upon the trial of the cause the district court ruled that the defendants had the burden of proof, and this ruling was accepted without objection. Evidence was offered from which it appeared that the docket of the justice in use at the time the case of *Marsh v. Miller* was in court had been lost or destroyed. An attempt was made to prove the contents in so far as they related to the case of *Marsh v. Miller*, but without success. The only witness called for that purpose was unable to remember what entries appeared

in the docket. Counsel for defendants then offered in evidence the abstract of the judgment which had been filed in the office of the clerk of the district court, and certain other evidence, and rested. The trial court found the issues for the plaintiff, and judgment was rendered and entered. It is from that judgment and from an order denying them a new trial that defendants appealed.

In their brief counsel for appellants say: "There is in fact but one really important question in this case, and that is: What [1] effect is to be given to what is designated as 'Defendants' Exhibit A,' being the 'abstract of judgment,' given by the justice of the peace and filed in the office of the clerk of the district court?" They then state their position very succinctly as follows: "The contention of counsel for appellants was and is that, as the abstract of judgment was in conformity with the provisions of sections 7056 and 7057, Revised Codes of Montana, it should be regarded as at least *prima facie* evidence that it was predicated upon a regular and valid judgment; and the burden of showing the contrary falls upon the party who brings its legal effect into question."

Our attention is directed to section 7071, Revised Codes, and to subdivisions 15 and 16 of section 7962. Section 7070 provides that every justice of the peace must keep a docket, and specifies in detail the entries which must be made in any given case. Section 7071, among other things, provides: "Such entries in a justice's docket, or a transcript thereof, certified by the justice, or his successor in office, are *prima facie* evidence of the facts so stated." While it is admitted that the abstract mentioned in section 7056 is not a transcript of the justice's docket, it is insisted that it should be given the same evidentiary force and effect; but with this we are unable to agree. It is only by virtue of the provisions in section 7071 above that the entries in the justice's docket, or a transcript thereof, possess evidentiary value sufficient to make out a *prima facie* case of the facts there recorded. In the absence of that statute no such rule of evidence could be invoked. But there is reason for the rule as



applied to the docket entries; for if the docket is kept as required by section 7070, it contains a complete history of the case, and this fact justifies the rule. But in attempting to apply it to an abstract of the judgment the reason for the rule is entirely wanting, for the abstract does not contain anything but the bare recital: "Judgment entered for plaintiff (or defendant) for \$—— [stating amount], on the —— day of —— [stating the date]."

But counsel for appellants invoke the presumptions of law found in subdivisions 15 and 16 of section 7962, as follows: " \* \* \* (15) That official duty has been regularly performed. (16) That a court or judge acting as such, whether in this state or any other state or country, was acting in the lawful exercise of his jurisdiction." However useful these rules, or however generously their language may be construed, they cannot suffice to relieve one whose asserted claim depends upon the validity of a justice's judgment from showing affirmatively that the court which rendered the judgment had jurisdiction, when the allegation that the judgment was duly given or made is controverted. Justices' courts are courts of limited jurisdiction, and no presumption in favor of their jurisdiction is to be indulged. In *Layton v. Trapp*, 20 Mont. 453, 52 Pac. 208, this court said: "The justice's court is a court of inferior jurisdiction, and there are no legal presumptions in favor of its jurisdiction. Its jurisdiction must affirmatively appear upon the face of the record. Proper proof of the service of the summons, by a person other than an officer, is a condition precedent to the rendition of a judgment by default, and without such proof the court has no jurisdiction." To the same effect are *State ex rel. Kenyon v. Laurandeau*, 21 Mont. 216, 53 Pac. 536; *Oppenheimer v. Regan*, 32 Mont. 110, 79 Pac. 695; *State ex rel. Collier v. Houston*, 36 Mont. 178, 12 Ann. Cas. 1027, 92 Pac. 476.

Our Code, section 7962, above, was evidently copied from California, which has had the same statute in force there since 1872 at least. (2 Code Civ. Proc. Cal. 1872, sec. 1963.) Many years before its adoption in California the supreme court of that state

had announced the doctrine that justices' courts are courts of limited jurisdiction, and that no presumption may be indulged in favor of their jurisdiction, but that the facts showing jurisdiction must appear affirmatively from the record. Notwithstanding the adoption of their Code containing the same presumptions as are found in subdivisions 15 and 16 of our section 7962 above, the same rules have been reiterated uniformly ever since their adoption of the Code provision. (*King v. Randlett*, 33 Cal. 318; *Cardwell v. Sabichi*, 59 Cal. 490; *Kane v. Desmond*, 63 Cal. 464; *Keybers v. McComber*, 67 Cal. 395, 7 Pac. 838; *Eltzroth v. Ryan*, 89 Cal. 135, 26 Pac. 647.) Since the statute had been construed by the highest court of the state from [2] which we borrowed it at the time of its adoption here, the rule that we adopted the statute as thus construed applies in this instance. (*State ex rel. Dolenty v. District Court*, 42 Mont. 170, 111 Pac. 731; *Deer Lodge County v. United States F. & G. Co.*, 42 Mont. 315, Ann. Cas. 1912A, 1010, 112 Pac. 1060; *State Savings Bank v. Albertson*, 39 Mont. 414, 102 Pac. 692.)

But aside from the rules of law enforced by the courts above, our Codes themselves appear to reserve the final word upon the subject. Section 6571 relieves a party pleading a judgment [3] from the necessity of setting forth at length the facts conferring jurisdiction, and authorizes him to make the bald declaration that the judgment was "duly given or made." Acting upon this authority, each of the defendants in this instance contented himself with such an allegation. The section above then continues: "If such allegation be controverted, the party pleading must establish on the trial the facts concerning jurisdiction." By reply the allegation in each of the answers that the judgment in *Marsh v. Miller* was duly given and made was controverted and by express statutory rule the burden was then imposed upon the defendants, claiming under the *Marsh* judgment, to establish on the trial the facts which showed that the justice's court rendering that judgment had jurisdiction. This they failed to do. In the absence of a statute embodying the rule announced in section 6571 above, the defendants would have been compelled to

allege and prove all facts necessary to show jurisdiction in the justice of the peace court. The only purpose of the statute is to relieve the pleader from setting forth the jurisdictional facts (*State v. Lagoni*, 30 Mont. 472, 76 Pac. 1044; *Weller v. Dickinson*, 93 Cal. 108, 28 Pac. 854); but it does not operate to relieve him of the necessity of proving those facts if his abbreviated allegation is controverted. On the contrary, that he is compelled to assume that burden the statute declares in unmistakable terms.

Since defendants' pretended claims depend altogether upon the validity of the justice's judgment, and they failed to show that the justice of the peace court had jurisdiction of the case of *Marsh v. Miller*, they failed to show any outstanding claim or title in either of them adverse to the plaintiff.

The judgment and order of the district court are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER CONCUR.

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CITY OF BUTTE, APPELLANT, v. GOODWIN ET AL., RESPONDENTS.

(No. 3,230.)

(Submitted February 15, 1913. Decided March 26, 1913.)

[134 Pac. 670.]

*Cities and Towns—Public Funds—Duty of Treasurer—Interest on Deposits—Failure to Pay Over—Official Bond—Nature of Undertaking—Nonsuit—Statute of Limitations—Duty of Court.*

City Treasurer—Public Funds—Interest on Deposits—Who Entitled Thereto.

1. A city treasurer is, as to the public funds in his hands, a trustee for the benefit of the city, and must account for and pay over any profits derived from their use.

Appeal and Error—Nonsuit—Erroneous Reason for Correct Ruling—Affirmance.

2. An order granting a nonsuit will be affirmed if correct in result, even though the particular reason given for the ruling was erroneous.

## City Treasurer—Failure to Pay Over Interest—Statute of Limitations.

3. Subdivision 1 of section 6449, barring an action upon a liability created by statute if not brought within two years, *held*, not to apply to an action against a city treasurer to recover interest received by him on deposits of city funds which he failed to turn over to his principal.

## Same—Statute of Limitations.

4. A city treasurer who failed to turn over interest received on public funds was guilty of a breach of his implied promise, as trustee of such funds, to do so, and not of a breach of a contract in writing—his official bond; hence an action to recover such interest, brought more than four years after the conclusion of the treasurer's term of office, was barred under subdivision 3 of section 6447, Revised Codes.

## Same—Official Bond—Nature of Undertaking.

5. The official bond of a city treasurer is not a contract in the strict sense of that term, but rather a collateral security for the faithful performance of official duty.

## Statute of Limitations—Nonsuit—Duty of Court.

6. Where upon the trial of a cause it was made apparent that the action was barred under the statute of limitations, it was the duty of the court to grant a motion for nonsuit.

*Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.*

ACTION by the City of Butte against Phil. C. Goodwin and the sureties on his bond as city treasurer, to recover interest alleged to have been received by him on public funds and which he failed to turn over to the city. From a judgment of nonsuit, plaintiff appeals. Affirmed. Mr. Justice Sanner dissenting in part.

*Messrs. H. Lowndes Maury, John A. Smith, and N. A. Roterling*, for Appellant, submitted a brief and one in reply to that of Respondents; *Mr. Maury* argued the cause orally.

This action of ours is based directly upon the common law as to the right of the thing—the equitable principle that has been grafted in and become a part of that common law: that all profit of every nature made by a trustee on trust funds is the property of the *cestui que trust*, and the law implies a promise that he will pay this profit to his *cestui que trust*. This is the most usual form of implied promise. The decisions in support of our contention that this interest belongs to the city of Butte, so far as we have been able to find, are as follows: *State v. McFetridge*, 84 Wis. 473, 20 L. R. A. 223, 54 N. W. 1, 998; *United States v. Mosby*, 133 U. S. 273, 33 L. Ed. 625, 10 Sup. Ct. Rep. 327; *Vansant v. State*, 96 Md. 110, 53 Atl. 711; *Wilkes Barre v.*

*Rockafellow*, 171 Pa. 177, 50 Am. St. Rep. 795, 30 L. R. A. 393, 33 Atl. 269; *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182; *Hunt v. State*, 124 Ind. 306, 24 N. E. 887; *Eshelby v. Cincinnati Board of Education*, 66 Ohio, 71, 63 N. E. 586. The most recent case of which we have knowledge is *Rhea v. Brewster*, 130 Iowa, 729, 8 Ann. Cas. 389, 107 N. W. 940. Particularly as to the liability of the bondsmen, we cite the court to *State v. McFetridge, supra*, and *Hunt v. State, supra*.

As to the question of the statute of limitations: The court held that the statute applicable was the one barring, "Within two years: An action upon a liability created by statute other than a penalty or forfeiture." (Rev. Codes, sec. 6449, subd. 1.) There is not any statute in Montana creating this particular liability. Either the treasurer is liable at common law and on the equitable principle of an implied promise which has been so long grafted into the common law as to become a part thereof, or he is not liable at all. The criminal statutes making his act felonious in nowise prescribes that he shall repay all interest received by him to the beneficiary, and furthermore, the legislature no more regulates the bonds of city treasurers than it regulates the bonds of administrators or guardians, or the bonds of contractors with the city. It leaves such matters entirely to city councils, and they prescribe the bonds of city treasurers and other city officials. The condition of the bond in question is not within the provisions of section 384, Revised Codes, which was section 1057 of the Political Code mentioned in *Philipsburg v. Degenhart*, 30 Mont. 302. It may be true that much of this bond was copied from the duties of city treasurers found in section 3257, Revised Codes, discussed as section 4788, Political Code, in the *Degenhart Case*; but there are many conditions left out of that statute and in this bond. In truth, this bond is simply a written undertaking on the part of Goodwin and the sureties to do the things set forth therein. It is a written contract between them and the city of Butte.

It was claimed in the argument in the court below that sections 393 and 394, Revised Codes, made this a statutory bond. A mere reading of either of those sections convinces at a glance

that the sole object of those statutes and the only construction to which their language is open is to render easy the collection of moneys by municipalities and the state where there have been some defects in form of statutory bonds. It never was contemplated that the remedy of suggesting the defect in the complaint by the municipality was the exclusive remedy.

There is nothing in the statutes of Montana barring a municipality from bringing suit on the plain terms of a common-law written undertaking, or an undertaking prescribed by its ordinances. "If a person occupying official position voluntarily gives a bond providing against loss by reason of his acts as to matters concerning which there is no statutory provision, such bond, although not a statutory bond, if it is founded on a sufficient consideration, and is not prohibited by statute, nor contrary to a public policy, is valid and binding on the principal and his surety as a voluntary common-law obligation." (Brandt on Suretyship and Guaranty, 3d ed., par. 618, and cases there cited.)

This suit was commenced within eight years; it was commenced within five years. This is an action on a written obligation, but were there no written obligation at all, and Goodwin had served without bond, the only other statute which could possibly apply would be the first subdivision of section 513, as amended by the Act of 1903, page 292, to-wit: "Within five years: An action upon a contract, account, or promise, not founded on an instrument in writing." Not only in this instance do we have the promise (which the law implies in Goodwin to pay this interest to the beneficiary), but we have his promise which he gave in the nature of his oath on entrance into office, and without which promise he could not have entered upon the duties of his office. Even if there were a statute rendering Goodwin in so many words liable civilly for this interest,—and none such exists, it ~~has~~ never been enacted,—yet that would not bring the case within the statute held by the lower court to be a bar, for if the court finds that the liability exists at common law as the decisions hold, then the liability existed before the statute, and the liability would not be created

by such statute,—it would merely be continued by such statute. (Sec. 6215, Revised Codes 1907.) The two year provision applies only to liabilities created by statute. Any other construction would lead to the greatest absurdities. It would bring all other rights protected by statute in Montana within subdivision 1, section 524, though there might be other limitations provided for such other actions.

*Messrs. Kremer, Sanders & Kremer*, for Respondents, submitted a brief; *Mr. Louis P. Sanders* argued the cause orally.

• The duration of the liability of the sureties on the official bond was coextensive with Goodwin's tenure of office and ceased when his term expired. (*Aultman T. M. Co. v. Burchett*, 15 Okl. 490, 83 Pac. 719.) "An official bond, though it is in one sense a contract in writing, is at the same time merely a security for the faithful performance by the officer of his official duties. Where the primary obligation of the officer is barred or in any legal way extinguished, the sureties are relieved in like manner as a guarantor upon a written guaranty to answer for the debt of another would be relieved, where the primary obligation of the principal debtor is barred or extinguished, notwithstanding the written contract." (*County of Sonoma v. Hall*, 132 Cal. 589, 62 Pac. 257, 312, 65 Pac. 12, 459; *State v. Blake*, 2 Ohio, 147; *State v. Conway*, 18 Ohio, 234; *Stearns' Law of Suretyship*, sec. 95; *Brandt on Suretyship and Guaranty*, sec. 148; *Spokane County v. Prescott*, 19 Wash. 418, 67 Am. St. Rep. 733, 53 Pac. 661; *Board etc. v. Hostetter*, 6 Kan. App. 286, 51 Pac. 62; *Board v. Van Slyck*, 52 Kan. 622, 35 Pac. 299; *Ryus v. Gruble*, 31 Kan. 767, 3 Pac. 518.) The action being barred as to Goodwin was also barred as to Hinds and all other sureties.

In support of the motion of the respondents for a nonsuit and to dismiss said action, the authorities are unanimous that upon the evidence the case was barred under the defense pleaded in the answers. The cause is one based upon a liability created by statute other than a penalty or forfeiture, and hence incapable of enforcement by suit unless brought within two years. The evidence affirmatively shows that the bond was executed to

cover the term for which Goodwin was elected beginning on the first Monday in May, 1905, and ending on the first Monday in May, 1907. The cause of action arose in May, 1907, at the very latest. (*Skagit County v. A. B. Co.*, 59 Wash. 1, 109 Pac. 197.) The complaint was filed May 27, 1911. In support of the defense that the action was barred under subdivision 1, section 6449, Revised Codes, the following authorities are submitted: *Sonoma County v. Hall*, *supra*; *State v. Davis*, 42 Or. 34, 71 Pac. 68, 72 Pac. 317; *Ada County v. Ellis*, 5 Idaho, 333, 48 Pac. 1072; *Canyon County v. Ada County*, 5 Idaho, 686, 51 Pac. 748; *People ex rel. Dunn v. Van Ness*, 76 Cal. 121, 18 Pac. 139; *Spokane County v. Prescott*, 19 Wash. 418, 67 Am. St. Rep. 733, 53 Pac. 661; *Davis v. Clark*, 58 Kan. 454, 49 Pac. 665; *Board of Commissioners v. Van Slyck*, 52 Kan. 622, 35 Pac. 299; *Paige v. Carroll*, 61 Cal. 211.

It is urged by counsel for appellant that the lower court committed error in holding that this is an action upon a liability created by statute, other than a penalty or forfeiture, barred unless brought within two years. The argument of counsel is that the bond sued on is not a statutory bond. That it is an official bond is conceded, and that it is therefore a statutory bond is made clear from a consideration of the statutes of Montana and the decisions bearing upon the question. (Rev. Codes, secs. 3238, 384, 393.) It substantially covers the requirements set forth in section 384. It expressly provides that "if the said Phil. C. Goodwin shall well and truly and faithfully perform all the duties pertaining to the said office and required of him by the laws and ordinances of the said city, *etc.*" It proceeds to add certain matter found in a city ordinance. It, however, does provide for the faithful performance of official duty, and this is equivalent to a recital of all the statutory conditions that are provided for, and is as binding on the parties as a statutory obligation as if all such conditions were inserted. In *State v. Nevin*, 19 Nev. 162, 3 Am. St. Rep. 873, 7 Pac. 650, it is held that where a bond requires faithful performance of official duty, it is as binding as if all the statutory duties of the officer were inserted therein. And so is the bond in ques-



tion. Our contention is made clear by the application of the provisions of section 393. Under it every liability provided by statute would be enforced by the court and the bond held to be a statutory bond. If these consequences do not necessarily follow from the provisions of section 393, then this section is meaningless and emasculated. We assert it is the official statutory bond of Goodwin that is the subject of action and that the appellant is estopped to deny that it is just such a bond. All of the sections of the Montana Code are found in the laws of California. The construction placed upon section 393 by the supreme court of California has been adopted by this court in the case of *Deer Lodge County v. United States F. G. Co.*, 42 Mont. 315, 327, Ann. Cas. 1912A, 1010, 112 Pac. 1060. This section was considered in the case of *Hubert v. Mendheim*, 64 Cal. 213, 30 Pac. 633, where an official bond alleged not to contain "the substantial matters or conditions required by law," was the subject of inquiry, and a conclusion reached favorable to our contention. (See, also, *People v. Huson*, 78 Cal. 154, 20 Pac. 369; *People v. Stacy*, 74 Cal. 373, 16 Pac. 192; *Faurote v. State*, 110 Ind. 463, 11 N. E. 474; *Ihrig v. Scott*, 5 Wash. 584, 32 Pac. 466; *State ex rel. Mitchell v. Smith*, 87 Miss. 551, 40 South. 22; *Smith v. Taylor*, 56 Ga. 292; *Yeakle v. Winters*, 60 Ind. 554.)

The bond in question includes the substance of a city ordinance, but even if this were treated as surplusage, it does not destroy the character of the bond as a statutory one. In the case of *City of Milwaukee v. United States F. & G. Co.*, 144 Wis. 603, 129 N. W. 786, the bond in suit simply provided that the official would "well and faithfully in all things execute and discharge the duties of" his office. Therein, it was argued that as the bond was not conditioned as the statute required, it was not an official bond, but only a voluntary bond. The same contention is made herein. It was held that, although the bond in suit differed in verbiage from the bond required by the statute, nevertheless, the bond covered that which the statute required, the surplusage would be rejected and the bond sustained as a good statutory bond. And if the bond in suit did

not contain any of the conditions set forth in section 384, but was restricted to such as the city of Butte by ordinance provided, it would be a statutory bond nevertheless. The conditions passed pursuant to ordinance would be just as much legislative as the provisions of section 384. "An ordinance passed by the common council is a species of legislation as much as an Act passed by the legislature, though the body passing it is subordinate in its character and created by the legislature itself." (*Crichfield v. Bermudez A. P. Co.*, 174 Ill. 466, 42 L. R. A. 347, 51 N. E. 552.) "An ordinance is in the nature of a local statute." (*Evison v. Chicago S. & P. M. & O. R. Co.*, 45 Minn. 370, 11 L. R. A. 434, 48 N. W. 6.) If the bond contained no conditions except such as were provided by ordinance, it would still, in its nature, be a statutory bond, existing by reason of the statutory requirements found in section 3238, Revised Codes. (*State v. Findley*, 10 Ohio, 51; *State v. Smith*, 8 Miss. 551, 40 South. 22.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

From the first Monday in May, 1905, to the first Monday in May, 1907, Phil. C. Goodwin was city treasurer of the city of Butte, and during that period it is claimed that he had on deposit with a bank large sums of public funds of the city, upon which the bank paid him interest in amounts aggregating \$4,243.39. It is to recover this money that this suit was brought by the city against Goodwin and the sureties on his official bond. It is alleged that notwithstanding he received this amount of interest upon the public funds belonging to the city, he failed and refused to account for or pay over such amount, or any part thereof, to the city or to his successor in office, but wrongfully converted the same to his own use. By separate answer Goodwin denied generally all the wrongful acts charged against him, and pleaded the bar of the statute of limitations. The sureties joined in a separate answer which, to all intents and purposes, is identical with the answer interposed by Goodwin. After plaintiff had concluded its evidence upon the trial of

the cause, the court sustained a motion by defendants for a nonsuit, upon the ground that at the time of its commencement the plaintiff's action was barred. Judgment was rendered and entered in favor of defendants, and it is from that judgment that the city appealed.

1. That it was the duty of Goodwin to turn over to the city the interest earned by the public funds of the city while in his possession is not controverted by his counsel, and could not be. Whatever may be the rule in jurisdictions where the city [1] treasurer is an insurer of the public funds, in this state, where that doctrine does not prevail (*City of Livingston v. Woods*, 20 Mont. 91, 49 Pac. 437), he is, in point of law, a trustee of the funds for the use of the city, and under the most elementary rules of law must account for and pay over any profits derived from the use of the trust fund. (*United States v. Mosby*, 133 U. S. 273, 33 L. Ed. 625, 10 Sup. Ct. Rep. 327; *State v. McFetridge*, 84 Wis. 473, 20 L. R. A. 223, 54 N. W. 1, 998; *Rhea v. Brewster*, 130 Iowa, 729, 8 Ann. Cas. 389, 107 N. W. 940.)

2. The statutes of limitation pleaded, and relied upon by defendants upon the motion for nonsuit, are subdivision 3 of section 6447, Revised Codes, which provides that an action upon an obligation or liability, not founded upon an instrument in writing, other than a contract, must be commenced within three years; and subdivision 1 of section 6449, which provides that an action upon a liability created by statute, other than a penalty or forfeiture, must be commenced within two years.

Goodwin's term of office expired and he was relieved by his successor on the first Monday in May, 1907. This action was not commenced until May 27, 1911, and the important question for determination is: Was the action barred? The trial court held that the action is one upon a liability created by statute and barred within two years by the provisions of subdivision 1 of section 6449 above. However, if the action was barred by either statute relied upon, the conclusion of the trial court will be sustained; for it is settled in this state that if a party [2] is entitled to an order, the action of the court in granting

it will be affirmed even though the particular reason given for the ruling may be erroneous. (*Harrington v. Butte etc. Ry. Co.*, 36 Mont. 478, 93 Pac. 640.) "If the court's ruling was correct, it is immaterial that it was founded upon an erroneous reason." (*Brown v. Daly*, 33 Mont. 523, 84 Pac. 883.) While cases may be found holding that an action of this character is one upon a liability created by statute, a review of the history [3] of the origin and purpose of that statute (subd. 1, sec. 6449 above) will demonstrate at once that it was never intended to apply to an action of the character of the one now before us. Since, however, the discussion of the question is not of any particular consequence here, we content ourselves with a reference to Kelly on Code Statute of Limitations, Chapter XX, for the history of the provision.

We agree with counsel for appellant in their terse statement of the character of Goodwin's liability, as follows: "Twist it as one may, the liability finds its root and substance in the implied promise, the equitable promise that the law makes for a trustee, whether he will or no, to answer and account for, and pay over to his beneficiary, the secret profits of the beneficiary's money. The law says a man is not permitted to assert anywhere, in any court, that he has not conscience enough to make such a promise. Equity refuses to allow a man to so abase himself, and this proposition of equity has so long endured that even under the most rigid terms of the common-law procedure the action was for a century, at common law, on an implied *assumpsit* to make the defendant pay over to the plaintiff that which the defendant had of the plaintiff, and which in equity and good conscience should be restored." And again: "Either the treasurer is liable at common law and on the equitable principle of an implied promise which has been so long grafted into the common law as to become a part thereof, or he is not liable at all."

In *Schaeffer v. Miller*, 41 Mont. 417, 137 Am. St. Rep. 746, 109 Pac. 970, we considered the character of such a liability and held that it arises from a breach of an obligation or legal duty, and that an action upon such obligation is barred by the provisions of subdivision 3 of section 6447, unless commenced within three

years after the cause of action accrues. Notwithstanding the clear and forceful expression of the rule of Goodwin's liability by counsel for the city as set forth above, they insist nevertheless that this action is one upon a contract, obligation or liability founded upon an instrument in writing, or, in other words, that it is an action for the breach of a contract in writing and covered by the eight-year period prescribed in section 6445. If it is an action upon the bond and the bond is a contract, then it is upon an express promise, and if upon an express promise, it could not be upon an implied one. But counsel are right in their statement as to the character of Goodwin's liability. The obligation sued on is not founded upon any instrument in writing, but rests altogether upon the rule of law which makes the promise for the trustee that he will account for and pay over all the earnings of the trust fund while in his possession, and the cause of action arises upon a breach of the duty thus imposed by law. If this action is based upon the bond, then for every violation of official duty which amounts to a breach of the obligation of the officer's bond an action might be maintained if brought within eight years after the cause of action accrues; but that this is not so the statute itself demonstrates. If a sheriff willfully permits the escape of a prisoner arrested on civil process, his act would constitute a breach of official duty for which he and his bondsmen would be liable; but the action would have to be brought within one year, under section 6450, notwithstanding the existence of the bond. So, likewise, if such sheriff should collect money on execution and wrongfully fail to pay it over to the party entitled, this would constitute a breach of duty and give rise to an action against him and his bondsmen, but such action would have to be commenced within three years, under subdivision 1 of section 6447. If the city treasurer wrongfully seizes the property of A for taxes when none are due, such an act would give rise to a cause of action in favor of A and against the treasurer and his bondsmen for damages for the wrongful seizure; but such action would have to be brought within one year under section 6450, notwithstanding the existence of the treasurer's official bond. So, likewise, if

the city treasurer retains interest on public funds and fails to [4] turn it over to the city, he is guilty of a breach of the obligation of his official bond, but this is so only because he is likewise guilty of a breach of his implied promise to pay over such interest. It is this breach of his obligation or legal duty which gives rise to a cause of action, and such action must be brought within three years after the cause of action accrues, under subdivision 3 of section 6447 above. (*Schaeffer v. Miller*, above.) The illustrations might be multiplied many times, but these suffice to indicate that the period of time during which an action may be brought against a public officer depends upon the character of his wrongful act, and not upon the fact that he has given a bond in writing for the faithful performance of official duties. The duty of the city treasurer to pay over the interest earned on the city's funds depended, not upon his bond, but upon his implied promise to do that which in equity and good conscience he ought to do. The duty was imposed by law and was not affected in the least by the giving of the bond. Goodwin's liability would have been precisely the same if he had performed the services without any official bond, or if he had failed to sign the bond which he did give. If the city has a cause of action against Goodwin, it arises from his wrongful act in retaining money which belonged to the city—if he did so—and not upon the violation of any express contract. If the city treasurer had not given any bond at all but had performed the duties of city treasurer and had received the interest which it is alleged he did receive, his duty to pay it over to the city would have been the same; his liability for failure to do so the same; the city's cause of action just the same, and the proof necessary to make out a case the same as in the present instance. (*Paige v. Carroll*, 61 Cal. 211; *Ryus v. Gruble*, 31 Kan. 767, 3 Pac. 518; *Spokane County v. Prescott*, 19 Wash. 418, 67 Am. St. Rep. 733, 53 Pac. 661; *State v. Conway*, 18 Ohio, 234.) Goodwin's failure to sign the bond would not have vitiated it or lessened his liability, and if he had not signed the bond, there cannot be any question that the action against him would have been barred in three years, and if barred as to the principal it would have been

barred as to the sureties, notwithstanding they had signed the bond (*State v. Kelly*, 32 Ohio St. 421; *Ryus v. Gruble*, above; *State v. Conway*, above); for the bond is not a contract in the strict sense of the term. It is a sort of vicarious undertaking—  
[5] a collateral security for the faithful performance of official duty. (*County of Sonoma v. Hall*, 132 Cal. 589, 62 Pac. 257, 312, 65 Pac. 12, 459; *Oregon v. Davis*, 42 Or. 34, 71 Pac. 68, 72 Pac. 317; *Walton v. United States*, 9 Wheat. (U. S.) 651, 6 L. Ed. 182.)

Since the action was not commenced for more than four years after the conclusion of Goodwin's term of office, it was barred by the provisions of subdivision 3 of section 6447.

3. In view of what we have said, it is quite immaterial whether the bond in question is strictly a statutory bond. It was Goodwin's official bond, is so designated in the complaint, and the liability of his sureties is not extended by any terms found therein, so far as the question now presented upon the application of the statute of limitations is involved.

4. When it appeared from the plaintiff's evidence that its  
[6] cause of action was barred, it became the duty of the trial court to sustain the motion of these defendants for a nonsuit. (*Chowen v. Phelps*, 26 Mont. 524, 69 Pac. 54.)

The judgment is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE SANNER: The above opinion establishes that the suit at bar is not upon a liability created by statute; that whatever interest Goodwin may have collected belonged to the city; that it was his duty to pay over or account for all moneys belonging to the city, whether principal or interest; and with all of this I agree. But I cannot assent to the conclusion that this action is barred because "upon an obligation or liability, not founded upon an instrument in writing, other than a contract, account or promise." (Subd. 3, sec. 6447, Rev. Codes.) It is quite true that in *Schaeffer v. Miller*, 41 Mont. 417, 137 Am. St. Rep. 746, 109 Pac. 770, and other decisions of this court prior

thereto, it is held that an action upon a constructive promise which has no foundation other than equity and good conscience, is barred by the above statute, on the theory that such a promise is no promise but a pure fiction of law; hence, if the language quoted from appellant's brief is to be taken as grounding its right to recover on such a promise and is binding on this court, the conclusion reached in the opinion is inevitable. As I understand the position of appellant, however, it is that this action is founded upon an express contract; that lying behind, justifying and furnishing the basis for the express contract is the common-law liability upon a promise to be implied from Goodwin's acceptance of the office, and which equity and good conscience will not permit him to deny. Whatever be the correct interpretation, I do not feel any more bound by the reasons of counsel than the opinion is by the reasons of the trial court.

It is required by the ordinances of the city of Butte that the treasurer "before entering upon the duties of his office, shall execute a bond to the city of Butte, with good and sufficient sureties," etc. In my judgment, there is here furnished sufficient consideration, sufficient explanation and sufficient requirement for the signature of the treasurer as it appears upon the instrument before us; that instrument contains the express stipulation on the part of Goodwin and his sureties that he shall pay over and faithfully account for all moneys coming into his hands belonging to the city; if he has not done this, I cannot understand how it can be that this express stipulation has not been violated, or why that violation is not the basis of his and their liability.

In *Schaeffer v. Miller* a clear distinction is made between those implied promises which are pure fictions of law, and those which arise from the conduct of the party sought to be charged. In the latter instance it is conceded that a true promise exists. Now, although a public office is not a contract, there is, I think, a true promise to be inferred from a public treasurer's acceptance of office, that he will pay over and faithfully account for all public moneys that may come into his hands by virtue of the office. That promise I conceive Goodwin to have made apart



from the bond; that promise was formally reiterated in set terms in the bond; and that promise applied to all moneys of the city coming into his hands, from whatever source derived. Implication may be necessary to the conclusion that the interest belonged to the city, but that the promise of Goodwin to pay over and faithfully account for the city's money is a pure fiction of law, I cannot believe.

Neither can I see any convincing reason for the rule announced in the opinion, in the fact that Goodwin's duty would have been the same if he had not signed nor given any bond; the fact remains that he did execute and give it. The concept of duty is undoubtedly back of Goodwin's liability, as it may fairly be said to be "the root" of all liability whatsoever. Breach of duty in some form is a necessary ingredient in every case; but that does not alter the fact that when the duty is formally expressed by written instrument, causes of action may be and often are founded, within the meaning of the statute of limitation, upon the instrument, even though no legal necessity existed for the execution of it.

So, I think the judgment is erroneous, even under the holding that "an official bond is not a contract in the strict sense of the term, but a sort of vicarious undertaking—a collateral security for the faithful performance of official duty." The effect of this rule is to gauge the liability of the sureties in all cases by that of the principal. If Goodwin was required to and did execute the bond, this action, as I see it, is not barred as to him. If his liability endures, that of the sureties endures also.

Rehearing denied May 7, 1913.

PREVISICH, RESPONDENT, v. BUTTE ELECTRIC RAILWAY  
CO., APPELLANT.

(No. 3,214.)

(Submitted March 17, 1913. Decided March 28, 1913.)

[131 Pac. 25.]

*Personal Injuries—Carrier and Passenger—Street Railroads—  
Crowded Cars—Standing on Footboard—Not Contributory  
Negligence Per Se—Burden of Proof—Pleadings—When  
Reply Unnecessary—Immaterial Variance—Verdict—When  
Contrary to Law—Excessive Verdicts.*

Personal Injuries—Street Railroads—Pleadings—Reply—When Unnecessary.

1. Where the complaint in an action by a passenger against a street-car company alleged, *inter alia*, that a telegraph pole, with which plaintiff collided while riding on the footboard of a crowded car, had been placed within a distance of less than four feet from the track, the affirmative allegation in the answer that such pole was not less than four feet and one inch away from the track did not constitute new matter but was the equivalent of a direct denial, requiring no reply.

Same—Verdict on Conflicting Evidence—Conclusiveness.

2. A verdict attacked on the ground of insufficiency of the evidence to sustain it will not be disturbed on appeal where the evidence is conflicting and where the court, after consideration of a motion for new trial, stamped the finding of the jury with its approval by denying the motion.

Same—Pleading and Proof—Immaterial Variance.

3. Between an allegation in the complaint that the telegraph pole with which plaintiff came in collision while standing upon the footboard of a crowded street-car was placed at a distance of less than four feet from the track, and evidence that it was within dangerous proximity to the track, there was not such variance as to preclude recovery.

Same—Verdict—When Contrary to Law.

4. A verdict cannot be said to be contrary to law, unless the evidence is such that the jury may not find otherwise than in accordance with the theory of the instructions, and yet have ventured to do so.

Same—Crowded Cars—Duty of Carrier to Warn Passenger.

5. Where a telegraph pole is in such dangerous proximity to a street-car track as to constitute it a menace to the safety of a passenger whom the company, owing to want of space inside, permits to stand on the footboard, the moving of the car without properly warning him is culpable negligence.

Same—Negligence—Burden of Proof—Instructions—Proper Refusal.

6. The burden was on plaintiff to prove that his injury was the result of defendant's failure to exercise such precautions as the case required, including omission to warn him of the dangerous proximity of telegraph poles, by contact with one of which he was brushed from the footboard where he was riding; hence an instruction requested by defendant which in effect would have cast such burden upon it was properly refused.

Same—Crowded Cars—Passenger Standing on Footboard not Contributory Negligence *Per Se*.

7. It is not contributory negligence *per se* for a person to ride upon a crowded car or upon the platform or footboard thereof; therefore an instruction that if plaintiff knew that the car on the footboard of which he was riding was crowded when he got on, he assumed the risk of being struck by telegraph poles erected alongside the track, even though he knew nothing of their proximity to the track, was properly refused; whether a passenger under such circumstances should be held to have assumed the hazard of his position is generally a question of fact for the jury, and not one of law for the court.

Same—Excessive Verdicts.

8. Verdict for \$5,000 in favor of plaintiff, of the age of twenty-one years at the time of the accident referred to in the paragraphs *supra*, scaled to \$2,500.

*Appeal from District Court, Silver Bow County; John B. McClerman, Judge.*

ACTION by Luis Previsich against the Butte Electric Railway Company. From a judgment for plaintiff, and an order denying it a new trial, defendant appeals. Affirmed on condition.

Messrs. George F. Shelton, Peter Breen, Fred J. Furman, and A. J. Verheyen, for Appellant, submitted a brief; Mr. Breen and Mr. Furman argued the cause orally.

When plaintiff alleges a specific ground of negligence upon which he bases his right of recovery, he is absolutely bound to maintain that ground, or he must fail of his recovery. (*Pierce v. Great Falls etc. Co.*, 22 Mont. 448, 56 Pac. 867; *Hoskins v. Northern Pacific Ry. Co.*, 39 Mont. 394, 102 Pac. 988; *Thurman v. Pittsburg & Mont. C. Co.*, 41 Mont. 141, 108 Pac. 588; *Knuckey v. Butte Electric Ry. Co.*, 41 Mont. 314, 109 Pac. 980.) Acts of negligence proved but not pleaded are not within the issues, and must be disregarded. (*Gregory v. Chicago Ry. Co.*, 42 Mont. 551, 113 Pac. 1123.)

There was no evidence whatever to sustain the allegation of the plaintiff's complaint that the telegraph or telephone pole against which he struck was less than four feet from the track upon which the car was being operated. The verdict, therefore, was clearly against the law, as laid down by the court; and, inasmuch as the plaintiff, in his complaint, particularly specified, as the ground of negligence upon which he sought to recover,

the fact that the track was constructed by the defendants at a distance of less than four feet from the poles in question, there is a complete failure of proof, for the reason that there is no evidence whatever to sustain the allegation. (*Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714; *Allen v. Bear Creek Coal Co. et al.*, 43 Mont. 269, 289, 115 Pac. 673, and cases cited therein.) It was, therefore, error for the court to go outside of the record and of the specific issues presented and instruct the jury upon abstract principles of law not raised by the pleadings nor presented in the case. The authorities to sustain this are numerous, unanimous and controlling. (*Mitchell v. Henderson*, 37 Mont. 515, 97 Pac. 942; *Portland First Nat. Bank v. Carroll*, 35 Mont. 302, 88 Pac. 1012; *Howie v. California Brewery Co.*, 35 Mont. 264, 88 Pac. 1007; *Hoskins v. Northern Pac. Ry. Co.*, 39 Mont. 394, 102 Pac. 988, at page 990; *Forsell v. Pittsburg & Mont. C. Co.*, 38 Mont. 403, 100 Pac. 218; *Pierce v. Great Falls etc. Ry. Co.*, 22 Mont. 448, 56 Pac. 867.)

Instruction No. 12 refused by the court, as well as instruction No. 13, presents clearly for the determination of the jury and for their consideration an important issue in the case, namely, whether the plaintiff was compelled to stand on the side board of the car because there was not room inside of the car for him to stand. He alleges in his pleadings that such was the fact. He fails to establish that by proof. The issue presented by the denial in the answer made it incumbent upon him to establish these facts by a preponderance of the evidence. The refusal of the court to so instruct the jury was a manifest error, because it failed to give to the jury for their consideration a definite and determinate issue for them to decide, under the pleadings and the testimony presented in the case. (*Buckley v. Silverberg*, 113 Cal. 673, 45 Pac. 804; *Fiore v. Ladd*, 25 Or. 423, 36 Pac. 572; *Stoll v. Loving*, 120 Fed. 805; 38 Cyc. 1126, 1632.)

*Messrs. William and Harry Meyer*, for Respondent, submitted a brief; the former argued the cause orally.

Instruction No. 12 tendered by appellant was properly refused, because it instructed the jury, in effect, that it was negli-

gence *per se* for a passenger to ride on the side board of a car. This is not the law. The instruction was further erroneous because it eliminated entirely the question as to whether or not the respondent occupied his position on the footboard of said car, with the knowledge and consent of the appellant. This question became very important. (*Kreimelmann v. Jourdan*, 107 Mo. App. 64, 80 S. W. 323.) "It is evidence of negligence on the part of the street railway company to carry passengers greatly in excess of the seating capacity of its trains and permitting them to stand on the platform and steps of the cars." (*Lobner v. Metropolitan St. Ry. Co.*, 79 Kan. 811, 21 L. R. A., n. s., 972, 101 Pac. 463.) "It is not contributory negligence *per se* to ride on a crowded car or the platform of such a car. \* \* \* One who rides on a crowded car assumes the inconvenience resulting from its crowded condition, but the company is not, for that reason, relieved from responsibility of using due care for the safety of the passengers invited upon the car." (*Lobner v. Metropolitan Street Ry. Co.*, *supra*; see, also, *Citizens' St. Ry. Co. v. Hoffbauer*, 23 Ind. App. 614, 56 N. E. 54; *Elliot v. Newport Street Ry. Co.*, 18 R. I. 707, 23 L. R. A. 208, 28 Atl. 338, 31 Atl. 694; *Seymour v. Citizens' St. Ry. Co.*, 114 Mo. 266, 21 S. W. 739; *San Antonio T. Co. v. Bryant*, 3 Tex. Civ. App. 437, 70 S. W. 1017; *Lehr v. Steinway & H. P. R. Co.*, 118 N. Y. 556, 23 N. E. 889; *Dunham v. Public Service Corp. of New Jersey*, 76 N. J. L. 452, 69 Atl. 1012.) "If a passenger is permitted to enter a car having no vacant place except on the platforms, and the conductor accepts his fare, he is justified in standing on the platform, if he exercises proper care in doing so; and by receiving him the carrier undertakes and gives him assurances that it will take care of him, and guard him against accident, as far as the circumstances permit." (*McCaw v. Union T. Co.*, 205 Pa. 271, 54 Atl. 895; *Cattano v. Metropolitan St. Ry. Co.*, 173 N. Y. 565, 66 N. E. 563; *Lynn v. Southern Pac. Ry. Co.*, 103 Cal. 7, 24 L. R. A. 710, 36 Pac. 1018; *Topeka City Ry. Co. v. Higgs*, 38 Kan. 375, 5 Am. St. Rep. 754, 16 Pac. 673; *Anderson v. City etc. Ry. Co.*, 42 Or. 505, 71 Pac. 660.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for a personal injury alleged to have been suffered by plaintiff while a passenger upon one of the cars of the defendant street railway company, through the negligence of its agents and servants. The corporation owns and operates a railway, the lines of which traverse certain streets of the city of Butte. One of these lines extends to the village of Meaderville, lying to the northeast. Miners who reside in Butte and are employed in the mines in Meaderville and its vicinity commonly avail themselves of this line in going to and returning from their work. For the accommodation of such as work at night, three cars reach and leave the vicinity of the mines at about three o'clock in the morning. These are known as "owl cars." Those in use at the time of the accident were open for one-half of their length. Along the sides of the open portions extended footboards for the use of passengers in entering and leaving them. The defendant Wharton is the manager of the railway. On the morning of August 20, 1911, the plaintiff, having finished his shift in the Leonard mine, boarded one of the cars (the first one leaving) for Butte and became a passenger thereon. The complaint alleges, in substance, that the defendants negligently permitted such a number of persons to become passengers on this car that it became greatly crowded; that it became so overloaded that there was not sufficient room inside to accommodate all those seeking passage thereon; that for this reason the plaintiff was compelled to stand on the footboard, and did so with the knowledge and consent of defendants; that the track was so constructed that it was within a distance of less than four feet from a line of telegraph or telephone poles situated on the west side thereof; that, notwithstanding this fact and the fact that it was dangerous to move cars along the track while passengers were standing on the footboards the defendants negligently moved the car upon which the plaintiff was a passenger; that the plaintiff did not know that the track was so constructed that the car would pass near the line of poles; that, while plaintiff

was riding on the car, defendants allowed it to become so crowded that plaintiff, being forced to maintain his place thereon by holding to the handhold thereon on the side next to the line of poles, was struck by one of said poles and hurled to the ground; and that when he was struck he was in such a position that he could not see that the car was so near the poles, whereas the defendants knew, or in the exercise of ordinary care should have known, that the plaintiff was likely to be injured by collision with one of them. The injuries suffered by the plaintiff are described as injuries to his head, right eye, right shoulder, and other portions of his body, resulting in great mental and physical pain and suffering and permanent disability. The answer, after putting in issue the charges of negligence, alleges affirmatively that "the shortest distance between said street-car tracks and said poles was not less than four feet and one inch at any of the times mentioned in the complaint, and that the plaintiff, in the position which he occupied on the said car in question, saw, or could, in the exercise of ordinary care, have seen, each and every one of the poles in said complaint mentioned, and the distance of its position from the said street-car track, said distance being, as aforesaid, in no case less than four feet and one inch." There was no replication. When the introduction of evidence by plaintiff was completed, the court sustained a motion for nonsuit in favor of defendant Wharton and directed judgment to be entered in his favor. A like motion on behalf of the corporation was denied. The jury returned a verdict in favor of plaintiff for \$5,000. From the judgment entered thereon, and from an order denying its motion for a new trial, the corporation has appealed.

1. When the plaintiff offered evidence to sustain the [1] allegations of the complaint, objection was made to its introduction on the ground that the pleadings did not present a triable issue because the new matter alleged in the answer, standing without traverse by reply, constituted a complete defense to the action. The overruling of this objection is assigned as error, and the contention is seriously made that it is fatal to the

judgment because the plaintiff, by his admission thus made, established the existence of a state of facts which precluded a recovery. The contention is without merit. The allegation in question, quoted in the statement, following the denial of the charge in the complaint that the track was constructed within a distance of less than four feet from the line of poles, and that the plaintiff did not know that the cars, in moving along the track, would come in such close proximity to them, though affirmative in form, is nothing more than a second traverse of these allegations. It is what may be termed a counter averment, the equivalent of a direct denial. Proof of circumstances tending to show knowledge by the plaintiff of the dangerous conditions, and hence that he was open to the imputation of negligence in assuming a position on the footboard, would have been admissible under the denial; hence affirmative allegations on the subject were neither necessary nor proper, and a reply to them was not required. (*Mauldin v. Ball*, 5 Mont. 96, 1 Pac. 409; *National Wall Paper Co. v. McPherson*, 19 Mont. 355, 48 Pac. 550; *Rand v. Butte El. Ry. Co.*, 40 Mont. 398, 107 Pac. 87.)

2. It is argued that the evidence is insufficient to sustain the verdict: (1) In that it fails to show that there was not room inside of the car to accommodate the plaintiff, and hence that it was necessary for him to stand upon the footboard; (2) in that it does not tend to show that the line of poles was within less than four feet from the line of the track; and (3) in that it does not tend to show that the plaintiff did not know, or could not by the exercise of ordinary care have ascertained, this fact. We shall not undertake to set out in detail and analyze the statements of the different witnesses with a view to reconcile them. As is usual in such cases, these statements are not in harmony upon any point with reference to which the defendant makes its contention. The testimony shows that there were some 250 men coming off shift and making ready to take cars into Butte. Of the three cars about due to leave, only one had arrived. Each man was anxious to secure passage upon it; hence there was a rush both for seats and for standing room. Plaintiff was among



the last to obtain a place, and, as he testified, all the seats, as well as standing room inside, had then been taken. He obtained a place upon the footboard. The rest of it was quickly filled by those that followed. These crowded him so that he was compelled to hold onto a handhold or one of the posts supporting the roof in order to retain his place. While the car was lighted, he could not see because of the darkness outside, and the crowding of the men who were standing on the footboard, and not knowing of the proximity of the line of poles, and not being warned of this fact, he did not anticipate danger from them. He had traveled over the line before, but had on such occasions occupied a seat inside the car and had not observed conditions. There was evidence that all of the poles were beyond a distance of four feet from the track. There was also evidence that at least one of them (the one which struck plaintiff) was within a distance of less than four feet. One witness, who had occupied a seat near where plaintiff was standing, testified, in effect, that the plaintiff, having dropped his bucket, made an effort to catch it, and in doing so jumped or fell from the car. This witness stated further that he had warned the men on the footboard to look out for the poles. Another witness testified that, when the plaintiff was found by those who went back to ascertain if he was hurt, he was about midway between two of the poles, which were some seventy-five feet apart. The plaintiff is a foreigner, and, having little knowledge of the English language, cannot understand it when it is spoken.

It may be admitted that the case made by the evidence as a [2] whole is not very satisfactory from any point of view. Yet it presented a case for the jury, and their finding thereon, having been approved by the trial court in denying the motion for a new trial, we must accept as binding upon us, even though we should have reached a different conclusion upon it.

The court proceeded upon the assumption that it was incumbent upon the plaintiff, in order to recover, to show that the particular pole which brushed him from the car was within four feet of the track, and in the instructions so charged the jury

As we have already pointed out, there was evidence tending to establish this fact. While this feature of the case is not discussed in the brief of counsel, we venture the remark that [3] evidence showing that the pole was in such close proximity to the track as to be likely to come in collision with a passenger standing on the footboard and injure him would not have presented such a variance from the allegation in the complaint as to preclude a recovery. (*Robinson v. Helena L. & Ry. Co.*, 38 Mont. 222, 99 Pac. 837.) The purport of the allegation is that the line of poles was within dangerous proximity to the track, and evidence showing this condition would have been sufficient to justify a recovery, even though it were not demonstrated that any one of the poles was actually within the distance alleged.

3. The third contention is that the verdict is contrary to the law as declared in instructions 8 and 9 submitted to the jury. In the former the court advised the jury that, "in order for the plaintiff to recover in the action, it is necessary that he should have established, by a preponderance of all the evidence in the case, that it was dangerous to run cars on the track if they were crowded and passengers were standing on the footboard." The latter instruction is in part as follows: "That in order for the plaintiff to recover in this action, he must have established, by a preponderance of all the evidence in the case, that he did not know, and could not, in the exercise of ordinary care, have known, that the said street-car tracks were so constructed that the car upon which the plaintiff was a passenger would come in such close proximity to said telegraph or telephone poles as set forth in said complaint; and, unless you find that this has been established by a preponderance of all the evidence in the case, the plaintiff cannot recover in this action." It is insisted that, under each of these instructions, the jury were bound to find for the defendant because there is no evidence in the case furnishing a basis for the inference that the proximity of the line of poles to the track was a source of danger to one standing upon the footboard, nor tending to show that, if plaintiff did not actually know the conditions, he could not, by the exercise of ordinary care, have gained knowledge of them.

The railway track was the property of the defendant. It was using it for the carrying of passengers. If the proximity of it to the line of poles was a fault in the construction, it was the fault of the defendant. That it was a source of danger to one standing on the footboard is shown by the fact, if it was the fact, that the plaintiff was brushed from his position by one of the poles as the car passed it, and was thus injured. It was a question for the jury, upon the evidence, whether the plaintiff was injured in this way or whether he fell or jumped off in an effort to recover his bucket. It was also a question for the jury whether, under the circumstances disclosed by the evidence, in the exercise of ordinary care for his own safety, the plaintiff must have known that, in assuming a position on the footboard with others, he was exposing himself to the danger arising from the proximity of the poles. The instructions were both formulated to meet plaintiff's theory of the case, and since, as has already been pointed out, the evidence was sufficient to justify a verdict in his favor, it cannot properly be said that the verdict is contrary to the law. (*Mette & Kanne Distilling Co. v. Lowrey*, 39 Mont. 124, 101 Pac. 966.) A verdict is contrary to the law when the condition of the evidence is such that the jury may [4] not find otherwise than in accordance with the theory of the instructions, and yet have ventured to do so. (*Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673.)

4. Complaint is made that the court erred in submitting to the jury instructions 2, 3, and 5. It is said that, while correct as abstract propositions of law, they have no application to the issues involved in this case. Instructions 2 and 3 define generally the duties of carriers of passengers, as they are laid down in sections 5302, 5303, and 5347 of the Revised Codes, with reference to overcrowding of their vehicles, the furnishing of accommodations for passengers, etc. Instruction 5 defines the rights and duties of such carriers when its cars have been permitted to become overcrowded, and declares it negligence on the part [5] of the carrier, if it elects to move its cars while in that condition, to omit any precaution in the management of them which

the circumstances require, looking to the safety of the passengers. In our opinion, they were entirely pertinent to the issues in the case and were properly given. If the line of poles was in such dangerous proximity to the track as to constitute them a menace to the safety of passengers whom the agents of the defendant, owing to the want of space inside, permitted to stand on the footboard, the moving of the cars without properly warning such passengers was culpable negligence.

5. Error is assigned upon the refusal of the court to give requested instructions 12, 13, 15, and 16. Instruction 16 is as follows: "If you believe from a consideration of all the evidence that it has been established by a preponderance thereof that the plaintiff was warned of the danger of standing upon the side board of the said car, and thereafter still continued to occupy the position, and by reason of so occupying said position was hit by the pole and knocked from the said car, and suffered the injury complained of in consequence thereof, then you are instructed that the plaintiff voluntarily assumed the position of danger and had notice of the said danger, or, by the exercise of reasonable care, could have known thereof, and assumed the risk incident to his said position, and cannot recover in this action."

To justify a recovery, it was incumbent upon the plaintiff to show, by a preponderance of the evidence, that his injury was the result of the failure, on the part of the defendant, to observe such precautions as the exigencies of the case required. The substance of the charge in the complaint is that defendant [6] moved its cars negligently along the line of poles in dangerous proximity to the track, knowing that the plaintiff and others were standing crowded together on the footboard. Among the precautions which the circumstances required it to observe was to warn them of the possible danger. Whether it or anyone else gave warning (and knowledge from any source in plaintiff would have been effective to relieve the defendant from the imputation of negligence in this behalf) was a question of fact to be resolved by the jury. The burden rested upon the plaintiff, not upon the defendant. So that an equipoise in

the evidence would have required a resolution of it in favor of defendant. The evidence offered by the defendant on this point was defensive merely and not in avoidance. The instruction cast upon it the burden of proof and was therefore not a correct statement of the rule of law applicable. Though it was offered by the defendant, and though defendant could not have complained if it had been given, the court cannot be put in error for having refused it. Instructions 12 and 15 are open to the same objection. The latter would have been an express direction to the jury that, if it appeared from the evidence, by a preponderance thereof, that the plaintiff dropped his bucket and, in order to recover it, jumped from the car and was injured, he could not recover, whereas an equipoise in the evidence on this point would have been sufficient to acquit the defendant.

Instruction No. 13 is as follows: "You are further instructed that if the plaintiff voluntarily got upon the side board of said car after he knew that the said car was crowded, and that there was no opportunity for him to get inside of the car and in a position of safety, he thereby assumed the risk of the danger of being hit by the pole, even though the same was not brought to his knowledge or attention, and he cannot recover in this action." This instruction would have required the jury to return a verdict for the defendant, for the plaintiff testified that he took his position on the footboard because the car was crowded and there was no room inside. It is not contributory negligence *per se* [7] for a person to ride upon a crowded car or upon the platform of such a car; nor is it *per se* negligence for such person to stand on the footboard of a street-car which is crowded.

In *Lobner v. Metropolitan St. Ry. Co.*, 79 Kan. 811, 21 L. R. A., n. s., 972, 101 Pac. 463, it was said: "The practice of inviting and permitting passengers to ride on the platform of street-cars is so common that it cannot be held, as a matter of law, that a passenger in doing so is guilty of contributory negligence. One who rides on a crowded car assumes the inconvenience resulting from its crowded condition; but the company is not, for that reason, relieved from responsibility of using due care for the safety of the passengers invited upon the car."

In *San Antonio T. Co. v. Bryant*, 30 Tex. Civ. App. 437, 70 S. W. 1015, the court said: "It is not negligence *per se* for a passenger to stand upon the platform, steps, or running-board of an electric street-car which is crowded; and the weight of authority also supports the rule that it is not contributory negligence, as a matter of law, for a passenger to stand upon the platform of a car or the running-board, whether there be vacant seats or not in the inside of the car. And whether the passenger be standing upon the platform, running-board, or steps, the question of negligence and contributory negligence is held to be, in the majority of cases, a question for the jury to determine." Again, in *McCaw v. Union T. Co.*, 205 Pa. 271, 54 Atl. 895, it was said: "If a passenger is permitted to enter a car having no vacant place except on the platforms, and the conductor accepts his fare, he is justified in standing on the platform, if he exercises proper care in doing so; and, by receiving him, the carrier undertakes and gives him assurances that it will take care of him and guard him against accident, as far as the circumstances permit." The rule thus stated is recognized and applied by the courts quite generally, as appears from the following citations: *Geitz v. Railway Co.*, 72 Wis. 307, 39 N. W. 866; *Powers v. City of Boston*, 154 Mass. 60, 27 N. E. 995; *Lehr v. Railroad Co.*, 118 N. Y. 556, 23 N. E. 889; *Elliott v. Railway Co.*, 18 R. I. 707, 23 L. R. A. 208, 28 Atl. 338, 31 Atl. 694; *Citizens' St. Ry. Co. v. Hoffbauer*, 23 Ind. App. 614, 56 N. E. 54; *Seymour v. Citizens' Ry. Co.*, 114 Mo. 266, 21 S. W. 739; *North Chicago St. Ry. Co. v. Williams*, 140 Ill. 275, 29 N. E. 672; *Doolittle v. Southern Ry.*, 62 S. C. 130, 40 S. E. 133; *Dunham v. Public Service Corp.*, 76 N. J. L. 452, 69 Atl. 1012; *Anderson v. City Ry. Co.*, 42 Or. 505, 71 Pac. 659; Joyce on Electric Law, sec. 543. Of course, as was said in *Lobner v. Street Ry. Co.*, *supra*, a passenger may assume such an obviously dangerous position that he will be held, as a matter of law, to have assumed the hazard of so doing; but the question is generally one for the jury, and not one of law for the court. Since the instruction would have told the jury that the plaintiff assumed the hazard of the position which he had taken upon the

footboard, without reference to his knowledge of the conditions, it was erroneous and properly refused.

6. The last contention is that the verdict is excessive, and with [8] this contention we agree. The plaintiff was, at the time of the injury, a strong, healthy man of the age of twenty-one years. The injury occurred on August 20, 1911. He did not call a physician until the following day. At that time he had a contusion on the right side of the head and was suffering somewhat from concussion, as was indicated by an incoherence in his speech. He complained of pains in the lumbar region, but no lesions were visible there. He also complained of pains in his right side, and there were evidences of contusions on that part of his body. No bones were broken. Judging from the testimony of the attending physician, the contusions themselves were not serious and readily yielded to treatment. All objective symptoms had disappeared by the end of six weeks. The most serious result was a traumatic pleurisy which developed in the right side immediately following the accident. This kept the plaintiff confined to his bed for some three or four weeks, during which the visits of the physician continued. Thereafter the plaintiff visited his physician at his office from time to time, until sometime in December, when the visits ceased altogether. The pleurisy yielded slowly to treatment, and, while the physician expressed the opinion that the after effect of it had not entirely disappeared, he was unwilling to express a definite opinion that there was or would be a chronic diseased condition or any permanent disability whatever. A physician who was called by the defendant, but who had made no examination of the plaintiff except a superficial one in the courtroom, testified that, when a chronic condition obtains after such an injury as that sustained by the plaintiff, it is usually tubercular in character. He stated that he did not observe anything in plaintiff's appearance to indicate any tubercular symptoms, but that, on the contrary, he appeared to be free from disease. The plaintiff testified, in effect, that he still suffered from the hurt and the resulting illness, and that he had not been able to do any work since he received it. When he sent for the attending physician

to administer to him, he sent also for an attorney, and notwithstanding the statement of the physician that he was not then fully conscious, owing to the concussion from which he was then suffering, according to his own story he then related to the attorney the facts touching the accident so as to enable the latter to draw the complaint in this case. It was verified by plaintiff five days later, and, though he has only a slight knowledge of the English language, he testified, through the interpreter, that he had examined the complaint without substantial assistance from anyone, and thereupon verified it with a full understanding of the allegations contained in it. The fact that it contains allegations of permanent injury made at a time when neither he nor his physician, as the latter himself admitted, could possibly have foreseen what the probable result would be, arouses a suspicion that his statement of his condition at the time of the trial was, to say the least, very much exaggerated. On the whole, the evidence tends to support the conclusion that the plaintiff, if such is not already the case, will presently be restored to full health. Under the circumstances, we think one-half of the amount of the award of the jury sufficient to compensate him for the injury which he appears to have sustained.

The cause is accordingly remanded to the district court, with direction to grant the defendant a new trial, unless, within thirty days after the *remittitur* is filed, the plaintiff shall file with the clerk his written consent that the judgment may be reduced to \$2,500. If such consent is given, the judgment shall be modified accordingly as of the date of its original entry, and, together with the order denying a new trial, will stand affirmed. That part of the judgment awarding costs in the district court is not to be disturbed. The plaintiff shall recover the costs on appeal.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.



## STATE, RESPONDENT, v. TUDOR, APPELLANT.

(No. 3,233.)

(Submitted March 19, 1913. Decided April 1, 1913.)

[131 Pac. 632.]

*Criminal Law—Gaming—Information—Surplusage—Waiver of  
Objection—Detectives—Cross-examination—Evidence—Com-  
petency—Oral Instructions—Record—Review.*

**Criminal Law—Gaming—Information—Surplusage.**

1. *Held*, under section 8416, Revised Codes, which makes gaming carried on or conducted by one as "principal, agent or employee" a crime, that an information charging defendant with a violation of said section "as owner and proprietor" of the game was not defective, the words last quoted being surplusage, neither restricting nor enlarging the meaning of the information.

**Same—Information—Demurrer—Waiver of Objection.**

2. A demurrer to an information on the general ground that the facts therein were not stated in ordinary and concise language, in such manner as to enable a person of common understanding to know what was intended, was equivalent to a waiver of the objection, in the absence of a distinct specification of the particular ground thereof, as required by section 9201, Revised Codes.

**Same—Rulings on Evidence—Error—Brief—Duty of Appellant.**

3. Counsel alleging error in rulings on evidence sought to be elicited on cross-examination must in his brief point out wherein they were prejudicial to the substantial rights of his client, charged with crime, it not being incumbent upon the supreme court, in the absence of such assistance, to make a critical examination of them in an effort to ascertain whether they in fact wrought prejudice.

**Same—Detectives—Evidence—Cross-examination—Exclusion of Evidence—Harmless Error.**

4. Where, though technical error was committed in the exclusion of testimony sought to be elicited by defendant from detectives on cross-examination, substantially all the pertinent facts relative to their character and credibility—the only purpose for which the evidence was material—were brought to the knowledge of the jury, the action of the court *held* nonprejudicial.

**Same—Detectives—Evidence—Competency.**

5. Testimony of detectives who acted as decoys and took part in a gambling game, for the unlawful carrying on of which defendant was on trial, *held* competent.

**Same—Instructions—To be Given in Writing.**

6. In the absence of a waiver by the parties to a criminal prosecution, the instructions to the jury must, under section 9271, Revised Codes, be delivered in writing.

**Same—Oral Instructions—Absence of Objection—Record—Review.**

7. Where, in a criminal cause, the only showing in the record on appeal that the instructions had been delivered orally instead of in writing as required by section 9271, Revised Codes, was the heading to the charge: "Oral Instructions of the Court to the Jury," and in the absence of any objection and exception to the alleged erroneous course pursued by the trial court, the assignment of error in counsel's brief in this respect *held* not to merit consideration.

*Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.*

OVERTON TUDOR was convicted of gaming and appeals from the judgment of conviction. Affirmed.

Cause submitted on briefs of counsel.

*Mr. J. L. Staats*, for Appellant.

*Mr. D. M. Kelly*, Attorney General, and *Mr. S. P. Wilson*, Assistant Attorney General, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant was charged by information by the county attorney of Gallatin county with the crime of gaming, as follows: "That the said Overton Tudor, in the city of Bozeman, in the county of Gallatin, state of Montana, on or about the 1st day of November, A. D. 1911, \* \* \* did then and there willfully and unlawfully carry on, open and cause to be open, conduct and cause to be conducted, operate and run, as owner and proprietor thereof, a certain gambling game, or game of chance, commonly called studhorse poker, then and there played with cards for money, checks and representatives of value," etc. He was found guilty and sentenced to pay a fine of \$500 and to undergo imprisonment in the county jail for a term of seven months and until the fine should be paid. This appeal is from the judgment. The cause was submitted upon briefs, without oral argument.

1. The contention is made that the court erred in overruling defendant's demurrer to the information. The grounds of the demurrer are (1) that the facts alleged do not constitute a public offense, and (2) that they are not stated in ordinary and concise language in such manner as to enable a person of ordinary understanding to know what is intended. Section 8416, Revised Codes, declares: "Any person who carries on, opens or

[1] causes to be opened, or who conducts or causes to be conducted, or operates or runs, as principal, agent or employee, any game of \* \* \* studhorse poker \* \* \* or any game of chance played with cards \* \* \* for money, checks, *etc.*, is punishable by a fine," *etc.* Its purpose is to declare it a crime for any person to open, carry on, or conduct any of the games enumerated, including those who act for him as his agents or employees, as distinguished from mere players. The charge in the information does not pursue accurately the language employed in the statute; nevertheless the allegation that the defendant did carry on, conduct, and cause to be conducted the game mentioned, is sufficient to charge him with the offense. (*State v. Wakely*, 43 Mont. 427, 117 Pac. 95.) The expression "as owner and proprietor thereof" does not clearly convey the meaning of the pleader. By the use of it he evidently intended to state definitely the relation of the defendant to the game to be that of principal or chief actor, but its presence does not affect the sufficiency of the charge. It may be rejected as surplusage, because it does not restrict or enlarge the scope or meaning of the information.

Section 9200, Revised Codes, enumerates the objections which may be made by demurrer to the indictment or information. Among them is the one sought to be availed of by the second [2] ground laid in the demurrer here. If it be conceded that the expression in question renders the pleading uncertain or indefinite, the defendant is not in position to take advantage of it because he does not specify the particular ground of his objection. Section 9201 provides that the demurrer "must distinctly specify the grounds of objection to the indictment or information, or it must be disregarded." Section 9208 provides: "When the objections mentioned in section 9200 appear on the face of the indictment or information, they can only be taken by demurrer, except that the objection to the jurisdiction of the court over the subject of the indictment or information, or that the facts stated do not constitute a public offense, may be taken at the trial, under the plea of not guilty, or after the trial, in arrest of judgment." Section 9157 declares: "No indictment

or information is insufficient, nor can the trial, judgment or other proceedings thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits." The purpose of these provisions is to require the defendant to raise all questions touching the form of the charge made against him, not going to the jurisdiction of the court or the sufficiency of the facts, by demurrer, and if he fails to do so, he must be conclusively presumed to have waived them. (*People v. Matuszewski*, 138 Cal. 533, 71 Pac. 701.)

2. Assignments of error from 2 to 16, inclusive, relate to rulings of the court upon the competency and materiality of [3] evidence sought to be elicited from the state's witnesses Zimmerman and Kelly, upon cross-examination. Since counsel for defendant, though alleging error in all of these rulings, does not undertake to point out wherein they were prejudicial, we do not think it is incumbent upon us to make a critical detailed examination of them, to determine whether they in fact wrought prejudice. Such examination as we have been able to make, however, without the assistance of either oral or printed argument, leads us to the conclusion that the substantial rights of the defendant were not prejudiced.

As in the case of *State v. Wakely*, *supra*, the two witnesses upon whose testimony the state relied for conviction were detected [4] tives. They were employed by some person or persons residing in Gallatin county to detect violations of the statute prohibiting gaming and other offenses, and to furnish evidence to convict the guilty parties. They testified that they were invited to take part in a game of stud poker which was being carried on by the defendant in the city of Bozeman; the players purchasing checks from him and settling their balances with him at the close of the game. On cross-examination they were questioned as to who employed them; what compensation they received; who paid it; the sources from which they obtained expense money, including the amounts they used in the game; what reports they made to any local officer or citizen; and other similar matters. Upon objection by the county attorney most of these

inquiries were excluded; but in so far as it was material as reflecting upon the character of the witnesses or their credibility—it was not material for any other purpose—sufficient of the information sought found its way into the possession of the jury during the course of the cross-examination to enable them to form a clear judgment as to whether the witnesses were entitled to credit. We think the court committed technical error in some of the rulings, but we think substantially all the pertinent facts were brought out. Therefore it does not appear that the defendant suffered prejudice.

3. Contention is made that the court erred in refusing to [5] direct the jury to acquit the defendant because the testimony of Zimmerman and Kelly was unworthy of credit. It is argued that while they were acting under the guise of detectives they were committing unlawful acts, and hence that their testimony was so far impeached that the court should have disregarded it as of no evidentiary value. This point is disposed of by the discussion in *State v. Wakely*, *supra*. The evidence was competent even though the witnesses did act as decoys, taking part in the transaction which itself was criminal; and the cases are numerous in which convictions on this character of evidence have been sustained. (*In re Wellcome*, 23 Mont. 450, 59 Pac. 445, and cases cited.) Though the defendant and one witness who was present when the game is said to have been played denied that there was any game opened or played, it was for the jury to ascertain the truth from the evidence such as it was.

4. The motion in arrest of judgment was properly denied. The contentions of counsel in this connection are the same as those urged against the action of the court in overruling the demurrer. They have already been disposed of.

5. It is argued that the court committed gross error in delivering its instructions to the jury orally instead of in writing. In considering this subject in *State v. Fisher*, 23 Mont. 540, 59 Pac. [6] 919, this court held that section 2070, Penal Code of 1895, made it obligatory upon the trial court in a criminal case to deliver its instructions in writing, and the defendant in that case was awarded a new trial because of the failure of the court to

observe the requirement of the statute. This section, as amended by the Act approved March 4, 1907 (Laws 1907, Chap. 82), appears in the Revised Codes as section 9271. The provision of the old section touching the mode of instructing the jury was not changed, however, by the amendment. The old section also prohibited comment by the court upon the instructions unless by the consent of the parties. The amended section contains no provision on this subject. It was further held, in effect, in *State v. Fisher*, that mere silence of the parties was not sufficient to justify the court in disregarding the injunction of the statute, and that nothing short of a formal consent was sufficient. Whether this requirement is to be deemed affected by the omission from the later section of the provision last mentioned, we need not inquire. It is sufficient to say that the necessity to observe the mandate of the statute as construed in *State v. Fisher* to submit all instructions in writing is, we think, in the absence of a waiver of the parties, still imperative.

The record in this case, however, is not sufficient to disclose what occurred in the district court. Whether the court delivered the instructions orally or in writing does not appear. True, [7] the instructions found in the record appear under the title, "Oral Instructions of the Court to the Jury." Otherwise the record is silent. There is no exception or other intimation that the court violated the statute. The only definite information conveyed is by the assignment of counsel in his brief. Under these circumstances, there being no complaint that there is error in any of the instructions as delivered, we are not disposed to reverse the judgment. If counsel in any case desire this court to review the action of the trial court with reference to any matter occurring during a trial, it is incumbent upon them to cause to appear definitely in the record the facts and circumstances characterizing the action. We cannot act upon bare inferences or statements of counsel for which we can find no substantial support in the disclosures made by the authenticated record.

The judgment is affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

## CURRY, APPELLANT, v. McCAFFERY, RESPONDENT.

(No. 3,307.)

(Submitted March 24, 1913. Decided April 1, 1913.)

[131 Pac. 673.]

*Election Contests—Record on Appeal—Statement—Verification—District Judges—Disqualification—Trial—Continuances—Jurisdiction.***Election Contests—Record on Appeal—Sufficiency.**

1. While section 7248, Revised Codes, confers the right of appeal on either party to an election contest, no provision is made for a record by which the appeal can be presented to the supreme court. Contestant in such a proceeding filed a record appropriate in an ordinary civil action. Mode of procedure *held* proper, under section 6329, which provides that where the course of procedure in any matter of which a court has jurisdiction is not specifically pointed out by the Code or statutes, any suitable process most conformable to the spirit of the Code may be adopted.

**District Judges—Disqualification—Power of Court to Call Other Judges.**

2. A district judge who deems himself disqualified in a matter pending in his court may call one trial judge after another until he can secure the services of one able to preside at the trial of the cause.

**Election Contests—Statements—Verification—Sufficiency.**

3. A verification attached to the statement of contest of an election in form substantially the same as that required for a pleading in a civil action was sufficient.

**District Judges—Disqualification—Manner of Calling in Other Judges.**

4. Unless the disqualification of a trial judge to preside in a cause pending before him is brought about by the filing of the affidavit mentioned in section 6315, Revised Codes, as amended (Laws 1909, p. 161), he is not required to first call upon the other judge or judges of his own district before he can invite a judge of another district to act in his stead.

**District Courts—Jurisdiction.**

5. Where the jurisdiction of a court is exclusive and has once lawfully attached, it cannot be ousted by subsequent events or facts arising in the cause; jurisdiction remains in it until final judgment, unless divested thereof through constitutional provision.

**Election Contests—Limit of Special Term or Session.**

6. *Held*, that the special session or term of the district court authorized by section 7241, Revised Codes, to be held for the determination of an election contest, is not limited to twenty days, or to any period of time, by either Constitution or statute.

**District Courts—Continuances.**

7. A court of record has authority of its own motion and in the absence of statute, to adjourn the hearing of a matter pending before it.

**Election Contests—Continuances—District Courts—Jurisdiction.**

8. *Held*, that the district court erred in dismissing an election contest on the ground that it lost jurisdiction because of an adjournment taken by it on its own motion (before actual commencement of trial)

for a period of time exceeding twenty days from the day originally set for the hearing; the statute (sec. 7244, Rev. Codes) not containing any restriction upon the power of the court relative to the subject of continuances, other than that neither party shall have a continuance, before commencement of trial, for more than twenty days, and that after commencement of trial adjournment shall be had from day to day only.

*Appeal from District Court, Silver Bow County; J. M. Clements, a Judge of the First Judicial District, presiding.*

ELECTION CONTEST by George Curry against Joseph J. McCaffery. From a judgment of dismissal, contestant appeals. Reversed and remanded.

*Messrs. Alexander Mackel, Wm. F. Davis, H. A. Tyvand, and I. G. Denny* submitted a brief in behalf of Appellant; *Mr. Davis* argued the cause orally.

*Messrs. John F. Davies, Kremer, Sanders & Kremer, James E. Healy, John V. Dwyer, and William Meyer*, submitted a brief for Respondent; *Mr. J. Bruce Kremer and Mr. Healy* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

At the general election held in Silver Bow county on the 5th day of November, 1912, Joseph McCaffery, H. Lowndes Maury, and Louis A. Smith were contesting candidates for the office of county attorney. The county canvassing board declared McCaffery elected, and issued a certificate to him. Within the time allowed by law for filing contests George Curry, a resident of Silver Bow County and a qualified elector therein, filed in the district court of that county his statement contesting the right of McCaffery to the office of county attorney. The ground of the contest is malconduct on the part of the election officers, which, it is alleged, resulted in depriving the rightful claimant of the office. On December 2, after this statement had been filed, the district court, presided over by Judge Lynch, made an order calling a special session of the court for December 16 to determine such contested election case, and directed



the proper citation to issue to the contestee. Due service of the citation was made, and on the 16th day of December the contestee appeared by motion. Judge Lynch, deeming himself disqualified, called in Judge Poindexter, of the fifth district, to hear the motion and to try the cause, and by agreement of the parties the further hearing was continued until December 19. On December 19, by agreement of the parties, Judge Pierson, of the thirteenth judicial district, was called in to hear all pending matters and motions and to try the cause, and the further hearing was continued until January 3, 1913. Some time thereafter the clerk of the court received a letter from Judge Pierson, to the effect that it would be impossible for him to hear the motion or try the cause. On January 3, 1913, the matter was called before the district court while Judge Lynch was presiding. Counsel for the contestee objected to Judge Lynch making any order or assuming any jurisdiction over the proceedings; but these objections were overruled, and an order was made calling Judge Winston, of the third judicial district, and the matter was set for hearing January 4. Judge Winston was unable to try the matter or hear the motion, and on January 4, in open court while Judge Lynch was presiding, and over the objection of the contestee that he had no jurisdiction to make any order, Judge Clements, of the first judicial district, was called to try the cause, including the hearing of the pending motion, and the matters were set for January 6. Judge Clements indicated that he could try the cause but that he could not be present until January 8. On January 6, in open court, Judge Lynch presiding, over the objection of the contestee that he had no jurisdiction to make any order and upon the further ground that no affidavit for a continuance had been filed, and that the cause could not be continued to a date more than twenty days from the 16th of December, 1912, the day upon which the cause was originally set for hearing, Judge Lynch set the matters over to January 8. On January 8 Judge Clements appeared in court, and, the matter being called, counsel for the contestee objected to any further proceedings, upon the ground

that the court had lost jurisdiction, for the reason that the hearing had been continued for more than twenty days from the day originally set for the hearing, and moved the court to dismiss the proceeding. The objection was sustained, the motion granted, and a judgment rendered and entered in favor of the contestee and against the contestant for costs. It is from that judgment that this appeal is prosecuted.

1. Objection is made to the record by which this appeal is sought to be presented. Under our Code the proceeding for contesting an election is classed as a special proceeding. While it partakes of the nature of a civil action, it is not in fact such an action. It is altogether statutory. The provisions of law governing are found in sections 7234-7249, inclusive, of the Revised Codes. The only provision with reference to an appeal [1] is found in section 7248, as follows: "Either party, aggrieved by the judgment of the court may appeal therefrom to the supreme court, as in other causes of appeal thereto from the district court." Jurisdiction—original in the district court and appellate in the supreme court—of a proceeding of this character is conferred by the state Constitution. The right in a party to the proceeding to appeal is conferred by section 7248 above. There is not any provision made for a record by which the appeal can be presented. Under such circumstances we have recourse to section 6329, which provides: "When jurisdiction is, by the Constitution or this Code, or any other statute, conferred on a court or judicial officer, all the means necessary to carry into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code." Apparently acting upon the analogy existing between the character of this proceeding and an ordinary civil action, counsel for appellant prepared such a record as would be appropriate in an ordinary civil action. The procedure thus adopted properly presents the matters for adjudication, appears suitable and in conformity with the spirit of our Code, and meets with our approval. The

objection urged against the record is untenable. (*In re Liter's Estate*, 19 Mont. 474, 48 Pac. 753; *State ex rel. Seres v. District Court*, 19 Mont. 501, 48 Pac. 1104; *State ex rel. Whiteside v. District Court*, 24 Mont. 539, 63 Pac. 395.)

2. That Judge Lynch had authority to call one trial judge after another, until he finally secured the services of one who [2] could preside at the trial of the cause, is not open to doubt or debate. (*Littrell v. Wilcox*, 11 Mont. 77, 27 Pac. 394; *State ex rel. Anaconda C. M. Co. v. Clancy*, 30 Mont. 529, 77 Pac. 312; 23 Cyc. 599.)

3. Complaint is made of the form of verification attached to the statement of contest. While it is somewhat informal, it is [3] to all intents and purposes the same as that required for a pleading in an ordinary civil action and is sufficient. (*Lane v. Bailey*, 29 Mont. 548, 75 Pac. 191; *Murphy v. Levengood*, 31 Mont. 34, 77 Pac. 311.)

4. The record fails to disclose the cause of Judge Lynch's [4] disqualification. He was not compelled to call upon the other judges of the second district, nor was he required to do so unless his disqualification was brought about by the filing of an affidavit under subdivision 4 of section 6315, as amended by the Act of 1909 (Laws 1909, p. 161). There is not any question, however, of Judge Clements' authority to act for Judge Lynch. (Sec. 12, Art. VIII, Mont. Const.)

5. The special session of court to hear this contest was ordered for December 16. The postponement to the 19th and again to January 3, 1913, was taken by agreement of the parties, and no one complains. By filing the statement of contest in time, the district court of Silver Bow county acquired complete jurisdiction of the subject matter involved herein, and by due service of the citation upon the contestee equally complete jurisdiction was acquired over the parties. The court having met at the time and place designated in the order convening the special session, there was then presented a question for adjudication, a court having exclusive jurisdiction, and a special term duly convened for the purpose of hearing and determining the question.

It is conceded to be the general rule that "where the jurisdiction of a court is exclusive and has once lawfully attached it [5] cannot be ousted by subsequent events or facts arising in the cause, but the court may proceed to final judgment unless some constitution or statute operates to divest that particular court of its jurisdiction." (11 Cyc. 690.) That there is not any provision of our Constitution by or through which the court lost jurisdiction of this matter must also be conceded.

In their brief, counsel for contestee say: "The jurisdiction of the court in this case was determined and ousted by the provisions of section 7244, Revised Codes of Montana." As the trial of this cause was never begun, the provision of section 7244, above, for adjournment from day to day, was never invoked. The adjournments after January 3 were taken from time to time before the commencement of the trial, and over the objection of the contestee. Paraphrased, that portion of section 7244, above, invoked by the respondent, reads as follows: Upon the application of either party the court may continue the trial before its commencement for not more than twenty days, upon two conditions: (a) That the applicant present good cause by affidavit; and (b) that he pay the cost of the continuance. But in the instant case every continuance was had upon the court's own motion. Neither party asked for a continuance, and, so far as this record discloses, neither party desired one. There could not be any showing of cause, and there was not anyone upon whom the cost of the continuance could be imposed. Therefore the provision of section 7244 for a continuance before trial has no application to the facts of this case. We are confronted with the fact that the trial court ordered these adjournments of its own motion. If Judge Clements had appeared and tried the cause on January 6, no complaint could have been made. The periods covered by the several adjournments, including the adjournment to January 6, equaled, but did not exceed, twenty days. The twenty days from December 16 would have expired on January 5, but for the fact that January 5 was Sunday, and, under the rule of computation of time prescribed by the Code, that day is excluded. If, then, the court

lost jurisdiction, it resulted from the postponement of the cause for trial from January 6 to January 8; and that this is the theory of counsel for respondent is evidenced by the recital in their brief: "The hearing of the contest was not begun until more than twenty (20) days had elapsed, to wit: on January 8, 1913. The term of court could only continue for twenty (20) days; the twenty (20) days having elapsed on January 6, 1913, and no hearing having been had or commenced, the special session of court which had been called, ended, and the court lost jurisdiction."

The orders postponing the trial from January 3 to January 4, and from January 4 to January 6, even if erroneous, were orders made within jurisdiction, and in the absence of any showing of injury or inconvenience to the contestee arising therefrom, they are to be treated as errors without prejudice; and the same rule would be invoked as to the postponement to January 8 if it was accomplished by an order which the court had authority to make. So that by this process of elimination we reach the only serious question presented, *viz.*: Did the postponement of the trial to a date more than twenty days from the day on which the special session was convened work a discontinuance of the proceeding? The answer to this involves a consideration of two other questions:

(1) Is the duration of the special session which is authorized [6] by section 7241 to be held to determine an election contest limited to twenty days? This inquiry must be answered "Yes" or "No." If the term is so limited, the limitation is absolute; for there is not any provision for extending it. The words "session" and "term" are used here interchangeably. They are both employed in section 7241 to meet the condition arising from the different situations of different courts within this state. In a judicial district such as the second, comprising but a single county, there are no terms of court; while in a district comprising more than one county there are terms. The word "session" is employed for a court within a district of the first class, and the word "term" for a court within a district of the other class; but the two words as here used mean the same

thing. If the duration of the special term or special session is fixed by hard-and-fast rule to twenty days, then any act performed in the matter after the expiration of that period would be *coram non judice* and void. (11 Cyc. 735.) If this cause had been brought to trial on January 3 before Judge Pierson, there cannot be any question of the right of the court to proceed. However, if contestee's theory of this statute is correct, the court would then have had but three days within which to complete the trial, and, if at the expiration of January 6 the trial was not completed, the mere expiration of that day would *ipso facto* work a dissolution of the special session of court and a discontinuance of the proceedings, even though neither party nor the court was at fault. Such a result ought not to be reached unless the language of the statute leads inevitably to that end. While the manifest purpose of the statute is to secure a speedy hearing of election contests, it is certainly of more consequence that a contest instituted in good faith be determined upon its merits, and that the very right of the case be ascertained, than that the controversy be ended speedily without regard to right or wrong.

In support of their view counsel for contestee cite *English v. Dickey*, 128 Ind. 174, 13 L. R. A. 40, 27 N. E. 495, but the decision was upon a statute which is quite different from ours, and one whose terms seem to lend support to the position taken. The statute considered by the Indiana court authorizes the trial board to grant continuances "not exceeding twenty days altogether." Of this the court said: "In our opinion it was the intention of the legislature that the entire time given to the consideration of a contested election case by the board of county commissioners should be twenty days altogether." There is not anything in our Code which limits the special term or special session to twenty days or at all. The language of section 7244, above, is that the court "may adjourn from day to day until such trial is ended." As indicated above, the limitation upon the power of the court to grant a continuance for not more than twenty days applies only when an application by one party has been made for cause. The provision is reasonable, and its pur-

pose is to prevent either party from having recourse to delay merely for the sake of delay. Our conclusion is that the decision of the Indiana case above is not authority upon the question of the construction of our statute, and that there is not any limit fixed by the Constitution or laws of this state to the special term or special session of court called to determine an election contest.

(2) Has the trial court authority of its own motion to postpone the trial of an election contest before the actual commencement of the trial? The position of counsel for contestee is, in effect—though not in terms—that the court does not have such authority, and support for this view is found in the declarations of the supreme court of California in construing statutory provisions similar to our own. In *Dorsey v. Barry*, 24 Cal. 449, there was presented the single question: Has the trial court authority to grant a new trial in an election contest case? The supreme court very properly determined that such authority was not lodged in the court and annulled all proceedings subsequent to the judgment confirming Barry's election. With that decision itself there cannot be any fault found; but, notwithstanding there was not involved any question of the power of the trial court to grant a continuance, and no continuance had been had, the supreme court, by *dictum* pure and simple, undertook to construe the provisions of the California statute similar to those of our section 7244, and said: "In section 62 of the Act, provision is made for the continuance of the special term, not exceeding twenty days, upon good cause shown before the commencement of the trial; and it further provides that after the commencement of the trial it may be continued from day to day until such trial is ended. The continuance in those two cases being provided for, all further power of continuance is excluded."

Counsel also cite *Norwood v. Kenfield*, 34 Cal. 329, but the only question involved there was the power of the judge at chambers to grant a continuance of the trial of an election contest after the special term had been fixed and before the trial

had actually commenced. The supreme court there very properly denied to the judge the power which he sought to exercise.

Counsel for contestee rely with great confidence upon the decision in *Keller v. Chapman*, 34 Cal. 635. In that case, after the trial of the contest had proceeded for two days, the trial court, on contestant's motion and over the objection of the contestee, granted a continuance for seven days. The supreme court refers to the *dictum* in *Dorsey v. Barry*, quoted above, and makes it the foundation for its further observations as follows: "The summary nature of the proceedings is inconsistent with the exercise of the general discretionary power of granting continuances possessed by courts in civil actions. The expression of the particular mode and time of continuance is exclusive of all non-enumerated modes and times. The continuance from the 6th of the month, when the cause was on trial, to the 13th of the same month, against the objections of the respondent and without an affidavit showing cause, was unauthorized, and operates as a discontinuance of the proceeding." We are unable to appreciate the force of that argument, and in our opinion the California court failed to grasp the meaning of the provisions of the statute involved. In *Falltrick v. Sullivan*, 119 Cal. 613, 51 Pac. 947, the decision in *Keller v. Chapman* is overruled in fact, though not in terms. In *O'Dowd v. Superior Court*, 158 Cal. 537, 111 Pac. 751, it was held that the provisions of section 1119 of the California Code of Civil Procedure (sec. 7242, Montana Rev. Codes) are directory merely. In *Hagerty v. Conlon*, 15 Cal. App. 643, 115 Pac. 762, the same rule was applied to the provisions of section 1118 of the California Code of Civil Procedure (sec. 7241, Montana Rev. Codes). In *Busick v. Superior Court*, 16 Cal. App. 499, 118 Pac. 481, the same rule was again applied to the provisions of section 1121, California Code of Civil Procedure, which are the same as the provisions of our section 7244, above. And in *Moore v. Superior Court* (Cal. App.), 128 Pac. 946, the doctrine of the *Busick Case* was reaffirmed. We are not required to adopt either theory thus advanced by the California court.



In our opinion, the language of section 7244, above, is too plain to admit of the application of any rules of construction. All that this court is called upon to do is to declare that the legislature meant just what it said. The section provides that, when the court has met at the time and place designated for the special term or session, it "shall have all the powers necessary to the determination" of the contest. The only limitations upon that authority are found in the same section, viz.: (1) Before the trial commences, neither party may have a continuance, even for good cause shown, for more than twenty days; and (2) after the trial commences the only adjournment to be had is from day to day. That a court of record has authority of its own motion, [7] and in the absence of statute, to adjourn the hearing of a matter pending before it, is the rule well-nigh universal (1 Ency. Pl. & Pr. 238); and that our own Codes recognize that rule as in effect in this state is manifested by the fact that in certain particular instances restrictions upon that power are imposed, as for instance, in section 8005. Since, however, there is not any restriction upon the power of the court of its [8] own motion to adjourn the hearing of an election contest before the trial actually commences, we hold that the district court of Silver Bow county had authority to adjourn the hearing of this matter to January 8, and in the absence of any showing of an abuse of the court's discretion or of prejudice resulting to the contestee, its action is to be approved. In holding that jurisdiction of this proceeding was lost by reason of the adjournment to January 8, the trial court erred.

The judgment is reversed and the cause is remanded for further proceedings.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

## BLAUSTEIN ET AL., RESPONDENTS, v. PINCUS, APPELLANT.

(No. 3,228.)

(Submitted March 18, 1913. Decided April 1, 1913.)

[131 Pac. 1064.]

*Landlord and Tenant—Constructive Eviction—Damages—Evidence—Past Profits—Admissibility—Briefs—Specification of Errors—Rules.***Landlord and Tenant—Constructive Eviction—Evidence—Sufficiency.**

1. Evidence in an action by a tenant against his landlord for damages based upon a constructive eviction, where the former, in reliance upon a five-year lease of a building theretofore occupied by him as a lodging-house, had made expensive alterations and improvements with a view to continuing in such business, and the latter, desirous of regaining possession of the premises for a more profitable use, but failing in his efforts to procure plaintiff's consent to a cancellation of the lease, erected a garage immediately adjoining the lodging-house, the noises and fumes originating in and emanating from which rendered the leased premises unfit for occupancy for lodging-house purposes, and caused plaintiff to quit the premises, *held*, sufficient to warrant a finding by the jury in favor of the latter.

**Same—Acts of Third Persons—Defense not Available, When.**

2. The acts of owners of automobiles who made use of defendant's garage, in getting them out and in, having been only such as defendant must have known would be incident to the use of the building as a garage, the contention that under the rule that the acts of third persons impairing the usefulness or enjoyment of demised premises do not amount to an eviction by the lessor, defendant could not be held responsible for the noise, fumes and smells created by them, was without merit.

**Same—Damages—Past Profits—Admissibility.**

3. Evidence of profits which plaintiff had actually realized during his occupancy of the premises prior to the acts of defendant which culminated in the former's eviction, objected to as incompetent, speculative and remote, was properly admitted in proof of damages sustained by plaintiff.

**Appeal—Specification of Errors—Briefs—Disregard of Rule—Penalty.**

4. A specification of errors made up of a mass of random narrative, unnumbered rulings of the trial court, explanatory statements and argumentative matter, in disregard of subdivision *b*, section 3, of Rule X of the supreme court, relative to what appellant's brief shall contain, lays the appeal open to dismissal.

*Appeal from District Court, Silver Bow County; J. Miller Smith, a Judge of the First Judicial District, presiding.*

ACTION by Max and Rosa Blaustein against Adolph Pincus. From a judgment for plaintiffs and an order denying his motion for a new trial, defendant appeals. Affirmed.

*Mr. J. L. Wines* and *Mr. T. J. Harrington*, for Appellant, submitted a brief; *Mr. Wines* argued the cause orally.

The covenant of quiet enjoyment protects the tenant only as against the successful assertion of a paramount right. If a tenant is disturbed in his enjoyment of the leased premises by one having an inferior right to his own, he has a remedy against the wrongdoer, either in an action for damages, or he may have an injunction. He must show a breach of the covenant of quiet enjoyment, and to constitute such a breach the act complained of must have been committed by one having a superior right to do such act than the tenant had to protect such right, and a better right than the tenant had to the enjoyment of his premises under his tenancy. Appellant insists that the same rule must apply in a case where a tenant has voluntarily abandoned the premises by reason of an alleged disturbance of his possession, and the one who is guilty of such acts, or causes such disturbance, must also, as in case of actual eviction, have a superior right to that of the tenant, who thus claims to have been constructively evicted. The covenant, "whether expressed or implied, means that the tenant shall not be evicted or disturbed by the lessor, or by persons deriving title from him, or by virtue of a title paramount to his, and implies no warranty against the acts of strangers. It is equivalent to a stipulation that the lessee shall not be rightfully disturbed in his possession during the term, not that he shall not be disturbed at all." (1 Taylor on Landlord and Tenant, 8th ed., sec. 305.) "But if the tenant is ousted by one who has no title, or in the language of the law, by strangers, it is a trespass for which the law leaves him to his remedy against the wrongdoer, since it arises from no fault of the landlord." (*Id.*)

Appellant, as landlord, could have maintained no action against the owners of the automobiles in question by reason of any failure on their part to comply with a covenant contained in the original lease between appellant and Angell and Zobel. It follows that there can be no action maintained as between them, neither by one or the other. It will thus be seen that if

appellant is liable to respondents in this case, by reason of the wrongful acts of these automobile owners, he is deprived of any remedy over against them on account of the fact that there is no relationship between them that makes one, in any sense whatever, liable for the acts of the other. (1 *Tiffany on Landlord & Tenant*, 810, sec. 123; *May v. Sheehy*, 4 Cranch C. C. 135, 16 Fed. Cas. No. 9335; see, also, *Wray-Austin Machinery Co. v. Flower*, 140 Mich. 452, 103 N. W. 873; *Wilson v. Martin*, 1 Denio (N. Y.), 602; *Gray v. Gaff*, 8 Mo. App. 329; 24 Cyc. 879, 880, and cases cited.)

Evidence was permitted by the court of past profits, and upon this respondents rely as being sufficient evidence of what their future profits might have been. Appellant's contention is that even in cases where future profits may be proven with that certainty that is required, such evidence is not admissible, nor sufficient, unless it is shown that conditions at two periods of time were the same. (See *Masterton v. Village of Mount Vernon*, 58 N. Y. 391; *Carlson v. Koerner*, 226 Ill. 15, 80 N. E. 562; *McKinnon v. McEwan*, 48 Mich. 106, 42 Am. Rep. 458, 11 N. W. 828; *Allis v. McLean*, 48 Mich. 428, 12 N. W. 640; *Parke v. Frank*, 75 Cal. 364, 17 Pac. 427; *Hotchkiss v. Patterson*, 5 Kan. App. 358, 48 Pac. 435; 2 *Sutherland on Damages*, 402; *Taylor v. Maguire*, 13 Mo. 517; Rev. Codes, sec. 6049.)

*Messrs. Harry and William Meyer* submitted a brief in behalf of Respondents; the latter argued the cause orally.

The law is that the landlord is liable for the eviction of his tenants, even though said eviction is caused by the acts of another tenant. (*Lay v. Bennett*, 4 Colo. App. 252, 35 Pac. 748; *Smith v. McEnany*, 170 Mass. 26, 64 Am. St. Rep. 272, 48 N. E. 781; *Bailey v. Kelly*, 86 Kan. 911, 122 Pac. 1027; *Collins v. Lewis*, 53 Minn. 78, 19 L. R. A. 822, 54 N. W. 1056; *Duff v. Hart*, 16 N. Y. Supp. 163; 24 Cyc. 1132B.) What constitutes an eviction?

"A party should be held evicted when the act of the landlord is of such a character as to deprive the tenant, or has the effect of depriving him, of the beneficial use and enjoyment of

the whole or any part of the demised property, to the extent he is thus deprived." (*Pridgeon v. Excelsior Boat Club*, 66 Mich. 326, 33 N. W. 502; *Lay v. Bennett*, 4 Colo. App. 252, 35 Pac. 748; *Kitchen Bros. Hotel Co. v. Philbin*, 2 Neb. (Unof.) 340, 96 N. W. 487; *Herpolsheimer v. Funke*, 1 Neb. (Unof.) 471, 95 N. W. 688; *Smith v. McEnany*, 170 Mass. 26, 64 Am. St. Rep. 272, 48 N. E. 781; *Agoure v. Lewis*, 15 Cal. App. 71, 113 Pac. 882; *Brown et al. v. Holyoke Water Co.*, 152 Mass. 463, 23 Am. St. Rep. 844, 25 N. E. 966; *Coulter v. Norton*, 100 Mich. 389, 43 Am. St. Rep. 458, 59 N. W. 163; 24 Cyc. 1132.)

"Any sort of annoyance, unless, perhaps, a mere trespass affecting the occupation of the property let, which prevented the tenant from enjoying it in as ample a manner as he is entitled to by the terms of the lease, amounts to a breach." (*York v. Steward*, 21 Mont. 515, 43 L. R. A. 125, 55 Pac. 29; *Edmison v. Lowry*, 3 S. D. 77, 44 Am. St. Rep. 774, 17 L. R. A. 275, 52 N. W. 583; *Tallman v. Murphy*, 120 N. Y. 345, 24 N. E. 716; *Jones on Landlord & Tenant*, secs. 354, 356; *Sully v. Schmitt*, 147 N. Y. 248, 49 Am. St. Rep. 659, 41 N. E. 514, sec. 5222, Rev. Codes.) A case almost on all-fours with the case at bar, and where the acts of the landlord in leasing the premises to a tenant to be used as a garage were held to amount to an eviction, is the case of *Wade v. Herndl*, 127 Wis. 544, 7 Ann. Cas. 591, 5 L. R. A., n. s., 855, 107 N. W. 4; see, also, *McCall v. New York L. Ins. Co.*, 201 Mass. 223, 21 L. R. A., n. s., 38, 87 N. E. 582. Under these authorities, it will readily be seen that the acts of appellant, performed by and through his tenants, amount to a constructive eviction of appellant.

Where the landlord makes a building useless, whether it be done by his own actions or by the actions of other tenants, he nevertheless is responsible. (*Adams v. Werner*, 120 Mich. 432, 79 N. W. 636; *Lay v. Bennett*, 4 Colo. App. 252, 35 Pac. 750; *Boyer v. Commercial B. I. Co.*, 110 Iowa, 491, 81 N. W. 721; *Haggart v. Stehlin*, 137 Ind. 43, 22 L. R. A. 577, 35 N. E. 997.)

Nor will appellant be heard to say that his tenants, who created the noise resulting in the damage to respondents, are the ones

who should be held liable, either severally or jointly with appellant. This is not for him to say; respondents had a perfect right to proceed against him individually without joining the tenants. (*Case v. Minot*, 158 Mass. 577, 22 L. R. A. 536, 33 N. E. 700; *Northern Trust Co. v. Palmer*, 171 Ill. 383, 49 N. E. 553; *Willard v. Bunting*, 34 N. Y. 153; *Fish v. Dodge*, 4 Denio (N. Y.), 311, 47 Am. Dec. 254.)

The action of the trial court in admitting evidence concerning past profits and instructing the jury that respondents could recover for prospective profits was correct and in accord with the great weight of authority. (*Jones on Landlord & Tenant*, sec. 370; *Snow v. Pulitzer*, 142 N. Y. 263, 36 N. E. 1059; *Hall v. Horton*, 79 Iowa, 352, 44 N. W. 570; *Kitchen Bros. Hotel Co. v. Philbin*, 2 Neb. (Unof.) 340, 96 N. W. 487; *First Nat. Bank v. Carroll*, 35 Mont. 302, 88 Pac. 1014; *Skinner v. Gibson*, 86 Kan. 431, 121 Pac. 513; *Fort-Smith W. R. Co. v. Williams*, 30 Okl. 726, 121 Pac. 275; 13 Cyc. 49-53; 24 Cyc. 1060D.) In *Mensing v. Wright*, 8 Kan. 98, 119 Pac. 374, the supreme court of Kansas held not only that future profits could be recovered in an action of this kind, but also that evidence of past profits, the same as was done in this case, was proper. (See, also, *Alden v. Mayfield* (Cal.), 127 Pac. 48.)

MR. JUSTICE SANNER delivered the opinion of the court.

The admitted facts in this case are: That from March, 1908, to April 1, 1910, the respondents, Max and Rosa Blaustein, were tenants under lease from the appellant, Pincus, of what is known as the Casino Theater in Butte. On March 1, 1909, these parties entered into another lease for the same premises to run for five years after April 1, 1910. This lease was in the usual form, except that it contained provisions to the effect that the premises should be used as a lodging-house and not otherwise, and that the lessees might make alterations as they saw fit, at their own expense, and should keep the plumbing in repair. Among the avenues through which light and air were admitted into this building were five windows in the east wall which was exposed. It was understood by all the parties that the lessees contem-

plated changes and improvements in the interior and the installation of furniture in order that the premises should be suitable for lodging-house purposes. These improvements were made and the furniture was installed by the lessees. In May, 1910, Pincus bought the lots adjoining the Casino and thereafter erected thereon a two-story garage, using the east wall of the Casino as the west wall of the garage; and in July, 1910, leased the garage to Angell & Zobell, by whom it has since been occupied.

It is alleged in the complaint, and denied in the answer, that at the time Pincus commenced the erection of the garage, the plaintiffs were enjoying a profitable lodging-house business at the Casino; that he intended to, and did, so erect the garage as to cut off the light and air theretofore furnished to the Casino on that side, and so as to admit into the Casino the noises, smells and fumes necessarily incident to the running of a garage; that the tenant of Pincus kept said garage open day and night, and the noises, smells and fumes emanating therefrom were of a character to, and did, injure the plaintiffs in the quiet and peaceable possession of the Casino, rendered it unfit for lodging-house purposes, and so disturbed the plaintiffs' customers and lodgers that they quit, so that plaintiffs ceased to be able to conduct a profitable lodging-house business therein; that in consequence of all this, plaintiffs were evicted from the leased premises, to their damage as follows: Lost profits, \$5,000; improvements rendered worthless, \$4,042; furniture rendered worthless, \$2,025.

The case was tried to a jury which returned a verdict for the plaintiffs awarding them damages in the sum of \$9,500, and judgment was entered accordingly. Defendant presented his motion for new trial, and the trial court ordered that the same be granted unless the plaintiffs would submit to a reduction of the judgment to \$3,395, in which case to stand denied. Plaintiffs accepted the condition imposed, and from the judgment as reduced, as well as from the order denying his motion for new trial, defendant Pincus has appealed.

That the jury were entirely warranted in finding for the respondents, there can be no question. The evidence in their [1] behalf alone—and it finds material support in appellant's case—abundantly shows that after the lease of March 1, 1909, was executed, and in contemplation of a peaceable and quiet tenure for the term thereof, they made material improvements in the Casino at a very considerable cost; that they installed furniture necessary to the running of a lodging-house and had worked up a profitable patronage. For several days prior to the 20th day of May, 1910, Pincus had made persistent efforts to get them to surrender the lease and give up the premises, in order that he might apply them to other and more profitable uses. The following extract from the testimony of Max Blaustein will illustrate the attitude of Pincus in this regard: "Mr. Pincus came across to me and said, 'Blaustein, I have something to talk with you. \* \* \* I would like you to surrender the lease; turn me over the building back. \* \* \* I will tell you the reason why. I want to build up here a garage which will bring me about \$250 a month.' I said, 'Where will I hunt for my investments in the place?' and he says, 'Now, here, Blaustein, there is no use to chew the rag about; if you don't surrender me the lease on the building, I will drive you from the place.' I said, 'How is that, Mr. Pincus?' and Mr. Pincus said, 'Now, here. You remember I told you I owned some ground east of the building.' I said, 'Yes, I do.' He said, 'I am going to buy the rest of the ground, what I need for a garage, from the Centennial Brewery, and I build up a garage and you shall know for the smoke and the noise of all automobiles and the bad odor, the only thing that was made for to allow light and ventilation, and that is the way I will drive you out of the place.' " Within a week after this conversation the construction of a garage on the adjoining lots was commenced. In the construction the windows in the east wall of the Casino—which formed the west wall of the garage—were not walled or boarded up but were nailed down so that they could not be moved. As to the character and effect of the noises, smells and fumes which



found their way into the lodging-house from the garage, the testimony is quaint but clearly founded upon personal experience. Max Blaustein testified: "I do not know how to explain the noise but I have seen the men getting out and cranking the machinery and then jumping in the machine and going out, and that would take only a half a minute sometimes. And then I have seen them going ahead and cranking the machine, turning it around three or four times, having a hold of a crank or a handle in the front, then he would go and open the hinges and start to look on the inside and that thing would be working away, and there is no question about it but what sometimes the automobile it is shaking and it stands in one place and shakes, and then he goes off for a hammer or a screw-driver or some other kind of a tool to fix something and the machine stands there and raises the dickens. Of course, I could hear it when I was looking at it. I could also hear it when I was in the lodging-house on the second floor, but I won't say I could hear it just as plain as when I was standing there looking at it."

Rosa Blaustein testified: "I would see smoke in the lodging-house. I knew it came from the garage. This smell that was there was from the gasoline, and there were all kinds of smells and I could hardly catch my breath when I used to go in. Sometimes I used to count the clothes for the laundryman, \* \* \* the linen was full of gasoline and full of smoke; full of the smell of gasoline and the smoke. I heard noises while I would be in the lodging-house. Any time the automobiles would come in at night, there was all kinds of noises; the automobile horns would be blowing, and when they go out—there is [a] floor upstairs—it was clear upstairs—driving the automobiles was something terrible. And I used to stay sometimes at night in the lodging-house and used to go in the office and sometimes Bulgarians, I couldn't make out what they want; they make all kinds of noise and I should give back their money, and sometimes they used to be upstairs, the most room, you know, upstairs, and they want I should give them back their money, they couldn't stay."

Joseph Blaustein testified: "After the garage was built I noticed that there was considerable noise, a smell and a peculiar odor. The noise which I noticed there was the tooting of the horns, combined with the cranking of the automobiles and the continuous loud and boisterous noise. It was the after-effect of the cranking of the automobiles. This noise was going on when I went on shift, and it would continue as long as I was there. There would be intervals between the noise. It was a very loud noise. It was plainly heard in the lodging-house and that is where I heard it. \* \* \* The odor was a sort of nauseating, occasioning a sort of peculiar sickness of the stomach as though you were about to vomit. \* \* \* I have noticed smoke in the lodging-house. It would be coming through the windows downstairs. As to being thick or otherwise, I will say that smoke would vary; sometimes it was thick, other times it was not. It was so that you could notice it. This continued from the time the garage was built until we finally left the place."

Jim Mike testified: "I used to room there when the garage was built. I remained there as a lodger about four weeks after it was built and opened for business. \* \* \* After the garage moved in there and opened for business there was a lot of noise and smell. \* \* \* There was an awful smell of gasoline there; it was hard to stay in there on account of the smell. \* \* \* The effect it had upon me and the other lodgers was to make us sick and we couldn't stand it. \* \* \* I couldn't get any rest there after the garage was built. \* \* \* The reason I left there was on account of the noise and smell. I remained in the city after I left there."

Similar testimony was furnished by other witnesses who had lodged with the plaintiffs but who were compelled to leave on account of the noises, smoke and smell from the garage; and this condition became so serious that the plaintiffs, having lost most of their patronage and being no longer able to profitably conduct a lodging-house in the Casino, were obliged to and did quit the premises in December, 1910. In the interim, however, they

made complaints of the condition to Pincus and requests of him for relief, and his invariable answer, it seems, was: "Blaustein, I told you what would be the result of it"; or "Mrs. Blaustein, I told you the consequence, what it will be."

Appellant concedes that in the lease in question there is implied a covenant for quiet enjoyment. That the circumstances disclosed by the evidence were such as to destroy the quiet enjoyment of the Casino by the respondents, were sufficient to justify them in quitting the premises and were tantamount to an eviction is too clear for discussion. (*York v. Steward*, 21 Mont. 515, 43 L. R. A. 125, 55 Pac. 29; *Osmers v. Furey*, 32 Mont. 581, 81 Pac. 345; *Wade v. Herndl*, 127 Wis. 544, 7 Ann. Cas. 591, 5 L. R. A., n. s., 855, 107 N. W. 4; *McCall v. New York L. Ins. Co.*, 201 Mass. 223, 21 L. R. A., n. s., 38, 87 N. E. 582; *Adams v. Werner*, 120 Mich. 432, 79 N. W. 636; *Lay v. Bennett*, 4 Colo. App. 252, 35 Pac. 748; *Tallman v. Murphy*, 120 N. Y. 345, 24 N. E. 716; *Northern Trust Co. v. Palmer*, 171 Ill. 383, 49 N. E. 553; *Fish v. Dodge*, 4 Denio (N. Y.), 311, 47 Am. Dec. 254; *De Palma v. Weinman*, 15 N. M. 68, 24 L. R. A., n. s., 427, 103 Pac. 782.)

We are unable to appreciate the argument of appellant that because the tenants of the garage owned no machines, and the [2] noises, fumes and smells were occasioned by the acts of private owners who merely rented stalls in the garage, there was no such privity with Pincus as to render him responsible. Doubtless it is the rule that the acts of third persons impairing the usefulness or enjoyment of demised premises do not amount to an eviction by the lessor (24 Cyc. 1132); but nothing is shown to have occurred that might not be expected to occur in a garage; the getting of the machines in and out of the garage, whether by private owners or others, was a necessary incident in the business of the garage, as was also whatever noises, smells or fumes might arise out of that process. It was to accommodate the business of a garage that Pincus designed, built and rented the building, with full knowledge of the annoyance it might cause to the respondents. It is not at all clear that all the noises, fumes and smells were generated by the acts of private owners

or that the lessees of the garage were in every instance innocent of actual participation therein; but whether this be so or not, it would be the refinement of artificiality to hold Pincus blameless for a result so clearly contemplated and foreseen.

2. It is insisted, however, that the damages allowed were not proven. There was evidence to show that after the execution of the lease and before the disturbances complained of the respondents made important changes in the interior of the Casino, besides installing a heating plant, all of considerable cost and value; also that as the result of the operation of the garage the business of respondents was, as an instrument of profit, practically destroyed. From these two elements alone, omitting furniture, it is not difficult to compute a sum equal to, or in excess of, the amount finally allowed by the trial court. If anyone has cause to complain in this regard, it is not the appellant.

But it is urged the only evidence of damage on account of the loss of business and profits was incompetent, speculative and [3] remote. This has reference to the fact that as a basis of computation the court admitted evidence of profits which actually had been realized in the period of respondents' occupancy of the premises prior to the erection of the garage. This evidence, instead of lacking the fundamentals of admissibility, was singularly complete; it disclosed a permanent business of a stable and certain character, in which the daily income and expense maintained a consistent average throughout the period from March, 1909, to July 1, 1910; commencing with July, 1910, and for no apparent cause except the garage, the income dropped to less than one-half, although no corresponding reduction in the expense of operation was possible. We think this evidence was properly admitted (*First Nat. Bank of Portland v. Carroll*, 35 Mont. 302, 309, 88 Pac. 1012; *Snow v. Pulitzer*, 142 N. Y. 263, 36 N. E. 1059; *Schile v. Brokahus*, 80 N. Y. 614; *Kitchen Bros. Hotel Co. v. Philbin*, 2 Neb. (Unof.) 340, 96 N. W. 487; *Di Palma v. Weinman*, 16 N. M. 302, 121 Pac. 40; *Alden v. Mayfield*, 164 Cal. 6, 127 Pac. 45; *Mensing v. Wright*, 8 Kan. 98, 119 Pac. 374), and that it fairly sustained the burden assigned to it.

In view of the above conclusions, none of the rulings com-

plained of in the admission and exclusion of evidence presents any error prejudicial to appellant. Nor do we think the given instructions which are assigned as error are open to the objections urged against them on the trial. It is also clear that under the circumstances of this case the court was correct in modifying appellant's instructions numbered 1, 4, 7 and 17, and in refusing appellant's proposed instructions Nos. 2, 3, 6, 9, 11, 13, 15, 16, 19 and 20, since they were either framed on an erroneous theory or were inaccurate in phraseology, or were covered.

What is intended for an assignment of errors in appellant's brief covers twenty-eight pages and is a potpourri of random [4] narrative, rulings (unnumbered) of the trial court, explanatory statements and argumentative matter. This condition, counsel for respondents urge, entitles them to have the appeal dismissed, since it is unfair to them and has rendered their task of replying very difficult. An indisposition on our part to go to this length without warning has occasioned us much needless work in the effort to fairly review the trial proceedings. The rules relating to briefs, as promulgated November 20, 1911, are neither hard to understand nor laborious to follow; and we shall not again, in a similar situation, take the trouble that we have taken here to ascertain the character and value of appellant's contentions.

Finding no prejudicial error, the judgment and order appealed from are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied May 3, 1913.

MOORE, RESPONDENT, v. BUTTE ELECTRIC RAILWAY CO.  
ET AL., APPELLANTS.

(No. 3,235.)

(Submitted March 20, 1913. Decided April 5, 1913.)

[131 Pac. 635.]

*New Trial—Notice of Motion—"Upon Minutes of Cause"—  
Sufficiency—Mode of Procedure—Appeal and Error—Review  
—Presumptions.*

New Trial—Notice of Motion—"Upon Minutes of Cause"—Sufficiency.

1. A notice of intention to move for a new trial was not rendered abortive by the statement that the motion would be based "upon the minutes of said cause," instead of "upon the minutes of the court," the statutory language (Rev. Codes, sec. 6795), the former phrase, so far as imparting the information intended by the section to be given to the opposing party is concerned, being substantially equivalent to the latter.

Same—Motion—Mode of Procedure.

2. One intending to move for a new trial upon any ground other than those mentioned in the first four subdivisions of section 6794, Revised Codes, may, under section 6795, do so either upon the minutes of the court or a bill of exceptions; if he have several grounds, he may select one method for one ground of his motion, and another for the remaining ground or grounds.

Same—Review—Presumptions.

3. Plaintiff's notice of intention to move for a new trial specified seven grounds, among them insufficiency of the evidence and that the verdict was against law, and stated that the motion would be based, *inter alia*, upon the minutes of the court. While the record on appeal disclosed the methods pursued in presenting the other grounds, it was silent as to the course pursued in relation to the two mentioned above, both of which are properly reviewable upon the minutes. *Held*, that it being the duty of appellant to show error in the court in granting the motion, and no error having been made apparent in other respects, it will be presumed that the order, so far as relates to the two grounds specified *supra*, was based upon the minutes.

*Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.*

ACTION by Patrick J. Moore against the Butte Electric Railway Company and another. From an order granting plaintiff a new trial, defendants appeal. Affirmed.

*Messrs. George F. Shelton, Peter Breen, Fred J. Furman, and A. J. Verheyen*, for Appellants, submitted a brief as well as one

in reply to that of Respondent; *Messrs. Breen and Furman* argued the cause orally.

*Messrs. McCaffery & Tyler*, and *Mr. B. K. Wheeler*, for Respondent, submitted a brief; *Mr. Jos. J. McCaffery* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

In this action the verdict of the jury and judgment thereon were for the defendants. Thereafter the plaintiff filed his notice of intention to move for new trial, and later his motion was heard and granted. This appeal is from the order of the district court granting said motion.

The notice of intention to move for a new trial specifies seven grounds, to-wit, irregularities in the proceedings by which plaintiff was prevented from having a fair and impartial trial, misconduct of the jury, accident and surprise, newly discovered evidence, insufficiency of the evidence to justify the verdict, that the verdict is against the law, and errors of law. The notice recites: "This motion for a new trial will be based upon a bill of exceptions to be hereinafter prepared and served upon you, and upon the pleadings, papers, minutes, files, and records of said cause, and upon affidavits to be hereinafter served." The transcript on appeal, as filed in this court, does not pretend to be a complete record of the proceedings below, and it does not contain anything to put the trial court in error in granting the motion for new trial, if the motion was, or could have been, presented "upon the minutes of the court."

As we understand the appellants' contention, it is that the motion for new trial could not have been presented upon the minutes of the court for two reasons: (1) The notice of intention [1] does not state that the motion will be made upon the minutes of the court; that the word "minutes" in the notice does not mean "minutes of said cause," and that "minutes of said cause" is not "minutes of the court"; and (2) that as to the ground, errors of law, the plaintiff having elected to cover this in a bill of exceptions, "he could not under any circumstances

move for a new trial upon the minutes of the court." This is entirely too technical. The word "minutes" is used in the notice in obvious connection with the phrase "of said cause," and means "minutes of said cause." The term "minutes of the court," as used in the statute, means, of course, the minutes of the court in the particular cause, and contemplates that, "upon a motion for a new trial made upon the minutes of the court, the trial court may take into consideration all the pleadings, records, minute entries and the evidence offered at the trial, and, from the entire case thus presented, determine the motion" (*State ex rel. Cohn v. District Court*, 38 Mont. 119, 125, 99 Pac. 139); the phrase, "pleadings, papers, minutes, files and records of said cause," as used in the notice, can mean nothing else than the minutes of the court, as above defined. So that, although the notice of intention before us illustrates an unhappy tendency to depart from the statutory language, which, in matters of this kind, is much to be preferred, yet it gave the same information that the statute intends should be given, and it was, as to all purposes now considered, substantially equivalent.

The second criticism is founded upon the following language of the statute: "For any other cause it may be made, at the [2] option of the moving party, either upon the minutes of the court or upon a bill of exceptions." (Sec. 6795, Rev. Codes.) This is supposed by appellants to mean, not only that if a party move for a new trial for errors of law he must do so upon either the minutes of the court or a bill of exceptions, and not upon both, but also that if he have two grounds, such as errors of law and insufficiency of the evidence, he may not choose one method for the first and the other for the second. That construction is erroneous, as this court has indicated on several occasions. (*Gamer v. Glenn*, 8 Mont. 371, 20 Pac. 654; *Sanden v. Northern Pac. Ry. Co.*, 39 Mont. 209, 102 Pac. 145; *Cummings v. Reins Copper Co.*, 40 Mont. 599, 107 Pac. 904.)

The record here discloses that on his motion for new trial the plaintiff presented affidavits in support of his claims of [3] misconduct of the jury and newly discovered evidence, and that as to irregularities and certain errors of law he presented



a bill of exceptions; but as to the ground of insufficiency of the evidence, and that the verdict is against the law—grounds of motion reviewable upon the minutes of the court—we are not advised what the course of proceeding was. The situation is thus precisely similar to that in *Sanden v. Northern Pacific Ry. Co.*, *supra*, in which this court said: "The district court has general jurisdiction to grant new trials, and the action of that court is presumed to be regular. \* \* \* Under the law relating to motions for new trials in force at the date of the proceedings, such motion could be made and granted on the minutes of the court. \* \* \* As the notice of intention to move for a new trial recited that the motion would be made on the minutes of the court, and there is nothing to indicate that the order was not based upon the minutes, we cannot say that the court acted entirely upon the bill of exceptions. It may be that the bill was not considered by the district court, but that the order was based entirely on what was disclosed by the minutes. \* \* \* The burden is on the appellant to show that the district court was not warranted in granting the motion for a new trial, either on the bill of exceptions or the minutes of the court. \* \* \* "

No useful purpose would be served by determining whether any of the particular matters set forth in the transcript was sufficient to justify the action of the trial court; for, the appellant having failed to show that it was unwarranted, the order granting plaintiff's motion for new trial must be affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

SINGER, RESPONDENT, v. MISSOULA STREET RAILWAY  
CO. ET AL., APPELLANTS.

(No. 3,234.)

(Submitted March 19, 1913. Decided April 7, 1913.)

[131 Pac. 630.].

*Personal Injuries—Street Railroads—Rights of Travelers on  
Bridges—Contributory Negligence—Last Clear Chance—  
Negligence—Jury Question.*

Personal Injuries—Street Railroads—Rights of Travelers on Bridges—Contributory Negligence.

1. *Obiter*: A traveler in attempting to cross a bridge while riding a horse which, though up to that time gentle and accustomed to street-cars, became restive and unmanageable at the approach of a car, or in failing to retire therefrom, did not thereby become a trespasser upon the right of way of the railway company over the bridge, nor lay himself open to the charge of being guilty of contributory negligence as a matter of law.

Same—Last Clear Chance—Negligence of Motorman Jury Question.

2. Upon the assumption that plaintiff, in going upon the bridge on horseback under the conditions set forth in paragraph 1 *supra*, was guilty of negligence, and that the facts made the doctrine of the last clear chance applicable, evidence *held* to have made out a case for the jury upon the question whether the motorman in charge of the car in colliding with which plaintiff was injured, took such precautions as he should have taken to avoid injury to the latter, after he discovered his perilous position.

*Appeal from District Court, Missoula County; F. C. Webster, Judge.*

ACTION by George Singer against the Missoula Street Railway Company and one of its motormen. From a judgment for plaintiff, defendants appeal. Affirmed.

*Messrs. W. M. Bickford, V. S. Kutchin, and Wm. F. Wayne* submitted a brief in behalf of Appellants; *Mr. Wayne* argued the cause orally.

Respondent was guilty of gross initial negligence in the following respects: (1) In attempting to ride his horse across the bridge knowing the likelihood of meeting street-cars thereon, without adequate equipment with which to control him. (2) In that he refused to take advantage of the opportunity presented

to him during the entire time elapsing from the moment when the car came into view to the moment of the collision (a distance of some 300 feet), to turn the animal about, or permit him to turn about as he was making every effort to do, and proceed northward off of the bridge and to a place of safety. The law required of him the exercise of reasonable care for his own safety and presumed that he would exercise it. (Rev. Codes, sec. 7962, subd. 4; *Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243.) "The duty of guarding an individual against injury which the law imposes upon a railroad company is no higher or greater than that which the individual owes to care for his own safety." (*Southern Ry. Co. v. Bailey*, 110 Va. 833, 67 S. E. 365.) The burden of proof was upon respondent, as soon as his negligence was developed in his own evidence, to exonerate himself from the effect thereof by a fair preponderance of the evidence. He chose to take the position that, conceding his negligence, appellants had a last clear chance to avoid the injury by the exercise of ordinary care. The burden of proof was thus upon him to prove (1) that his position of peril was discovered by appellants (*San Antonio Traction Co. v. Kelleher*, 48 Tex. Civ. App. 421, 107 S. W. 64); (2) ability of appellants to avoid the accident by the exercise of ordinary care (*Plinkiewisch v. Portland Ry. etc. Co.*, 58 Or. 499, 115 Pac. 151; *Trigg v. Water etc. Transit Co.*, 215 Mo. 521, 20 L. R. A., n. s., 987, 114 S. W. 972; *Butler v. Rockland etc. Ry. Co.*, 99 Me. 149, 105 Am. St. Rep. 267, 58 Atl. 775); and there was no proof introduced by him, either in chief or in rebuttal, upon either of these matters.

The doctrine of the last clear chance presupposes (1) initial or contributory negligence of the person injured; (2) a perilous or dangerous position of the person injured created by such negligence; (3) discovery of this position by the person sought to be charged; and (4) new or primary negligence of the person sought to be charged subsequent to the negligence of the person injured, of such a character that without it the injury would not have occurred. It is the doctrine of discovered peril. The theory upon which it proceeds is that the initial or contributory

fault of the person injured has created a new condition, which is discovered by the person sought to be charged, and that subsequent to the discovery of this condition, the person sought to be charged has had a fair opportunity to avoid the injury by the exercise of ordinary care and has failed to do so. (*Hall v. Missouri etc. R. Co.*, 219 Mo. 553, 118 S. W. 56.) The plaintiff must show that at some point of time in view of the entire situation, including plaintiff's negligence, the defendant was thereafter culpably negligent and its negligence the latest in the succession of causes. (*Butler v. Rockland etc. Ry. Co.*, 99 Me. 149, 105 Am. St. Rep. 267, 58 Atl. 775; *Southern Ry. Co. v. Bailey*, 110 Va. 833, 67 S. E. 365; *Gumm v. Kansas etc. Ry. Co.*, 141 Mo. App. 306, 125 S. W. 796.)

The doctrine of the last clear chance does not apply where the peril of the person injured is not discovered, and could not by the exercise of ordinary care be discovered until too late to avoid the accident. (36 Cyc. 1568; *State v. Cumberland etc. Ry. Co.*, 106 Md. 529, 16 L. R. A., n. s., 297, 68 Atl. 197; *Laughlin v. St. Louis etc. Ry. Co.*, 144 Mo. App. 185, 129 S. W. 1006; *Rippetoe v. Feely*, 20 Idaho, 619, 119 Pac. 465; *Rissler v. St. Louis Transit Co.*, 113 Mo. App. 120, 87 S. W. 578; *San Antonio Traction Co. v. Kelleher*, 48 Tex. Civ. App. 421, 107 S. W. 64; 2 Thompson on Negligence, sec. 1629.)

Mere knowledge of the presence of the person injured without knowledge of his peril is not sufficient. (*Louisville Ry. Co. v. Colston*, 117 Ky. 804, 79 S. W. 243; *Rissler v. St. Louis Transit Co.*, 113 Mo. App. 120, 87 S. W. 578.) The doctrine can never apply when the negligence of the person injured continued up to the time of the injury, or, in other words, when both parties were contemporaneously and continuously negligent up to the time of the accident. (36 Cyc. 1567; *Sego v. Southern Pac. Co.*, 137 Cal. 405, 70 Pac. 279; *Everett v. Los Angeles etc. Ry. Co.*, 115 Cal. 105, 43 Pac. 207, at 210; *Tobin v. Omnibus Cable Co.*, 4 Cal. Unrep. 214, 34 Pac. 124; *Holmes v. South Pac. Coast Ry. Co.*, 97 Cal. 161, 31 Pac. 834; *Hager v. Southern Pac. Co.*, 98 Cal. 309, 33 Pac. 119; *Drown v. Northern Ohio Traction Co.*, 76 Ohio St. 234, 118 Am. St. Rep. 844, 10 L. R. A., n. s., 421, 81

N. E. 326; *Green v. Los Angeles Terminal Ry. Co.*, 143 Cal. 31, 101 Am. St. Rep. 68, 76 Pac. 719; *Gumm v. Kansas etc. Ry. Co.*, 141 Mo. App. 306, 125 S. W. 796; *Himmelwright v. Baker*, 82 Kan. 569, 109 Pac. 178; *Butler v. Rockland etc. Ry. Co.*, 99 Me. 149, 105 Am. St. Rep. 267, 58 Atl. 775; *Plinkiewisch v. Portland Ry. etc. Co.*, 58 Or. 499, 115 Pac. 151.)

The case of *Coughtry v. Willamette Ry. Co.*, 21 Or. 245, 27 Pac. 1031, was, in its facts, almost identical with our case: Plaintiff's driver was holding the team beside the track; when they saw the street-car coming they became uneasy, and when it was about 125 feet away one of the horses "danced" on to the track and continued there until struck by the car; the car was not going at its usual speed, but faster. It was held that there was no evidence of negligence on defendant's part to support a verdict for plaintiff.

*Mr. Harry H. Parsons*, for Respondent, submitted a brief.

It is not essential that appellants should have actually discovered respondent's peril in order that they might be held liable under the doctrine of the last clear chance. Actual knowledge is not necessary. If in the exercise of ordinary care upon their part they ought to have discovered his peril, that is sufficient. (*Bogan v. Carolina Cent. R. Co.*, 129 N. C. 154, 55 L. R. A. 418, 39 S. E. 808; *Neary v. Northern Pac. R. Co.*, 37 Mont. 461, 19 L. R. A., n. s., 446, 97 Pac. 944; *Hammond v. Eads*, 32 Ind. App. 249, 69 N. E. 555.) That the respondent was actually in a position of peril cannot be controverted. As so showing that his peril was actually discovered by appellants or that in the exercise of due care on their part it ought to have been discovered, we submit the following: Let us assume that the approximate cause of the collision was the frightened and unmanageable condition of the horse, and that in the absence of such condition the horse and the car would have passed each other in safety. (*Citizens' St. Ry. Co. v. Damm*, 25 Ind. App. 511, 58 N. E. 564.) Confessedly the car ran from 90 to 120 feet past the point of collision. That fact alone has been re-

peatedly held sufficient to show negligence on the part of the motorman and lack of contributory negligence on the part of the plaintiff. (*Stevens v. Union Ry. Co.*, 75 App. Div. 602, 78 N. Y. Supp. 624, 176 N. Y. 607, 68 N. E. 1125; *Binns v. Brooklyn Heights Ry. Co.*, 89 App. Div. 359, 85 N. Y. Supp. 874; *Bremer v. Railway Co.*, 107 Minn. 326, 21 L. R. A., n. s., 887, 120 N. W. 382.) "Each party must act reasonably under the attending circumstances." (Baldwin on Railway Law, 417.) "The motorman is not bound to anticipate that a rider will turn from a position of safety alongside the track and ride in front of a car in such a way as to bring about a collision." (*Id.* 421.) And the plaintiff likewise had the right to assume that the motorman would exercise ordinary care and diligence to prevent an accident or collision of this character. (*Indianapolis St. Ry. Co. v. Schmidt*, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478; *Bremer v. Railway Co.*, 107 Minn. 326, 21 L. R. A., n. s., 887, 120 N. W. 382.) "The motorman must be on the constant watch for teams or cyclists turning upon the track, and keep his car under such control as to be able to slacken speed or come to a stop, should their safety seem reasonably to demand it." (Baldwin on Railway Law, 421.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This is an action for damages for personal injuries sustained by the plaintiff in a collision with one of the electric cars of the defendant railway company upon Higgins avenue bridge, in the city of Missoula, on January 7, 1911. The defendant Miner was the motorman in charge of and operating the car at the time of the accident. The bridge extends across the Missoula river at the foot of Higgins avenue, connecting the city proper with South Missoula. It is 1,023.6 feet in length, and consists of a roadway, 28.90 feet in width, with a footway on either side separated from it by railings. A single car track, four feet in width, lies in the middle of the roadway. Allowing for the overhang of a car when passing over the track, there is left between it and the footway railing on either side a clearance for vehicles,

*etc.*, of 10.6 feet. The south end of the bridge is 7.54 feet higher than the north end. From the south the roadway ascends on a grade of about one per cent for a distance of 174 feet, and then descends on substantially the same grade to the north. After a car passing in either direction reaches the highest point, the power is shut off, and it is allowed to drift down the incline, the motorman controlling the speed by means of air brakes. The plaintiff's home is in South Missoula. On the day of the accident he started from Missoula to go to his home. He was riding a heavy draught horse, weighing about 1,500 pounds, which had on it a light single harness with a blind bridle. He did not have a saddle, but was using a piece of blanket instead. The different parts of the harness were so secured as not to interfere with the horse's movements. When the plaintiff had reached a point on the bridge about 300 feet from the north end, he observed a car approaching from the opposite direction at a distance of about 300 feet. At the sight of the car, and presumably owing to the noise created by its movement, the horse became restive and attempted to turn and run. The plaintiff struggled to hold it under control, but was not able to subdue it. The result was that it got between the rails as the car was about to pass, and was killed by collision therewith, the plaintiff being thrown to the roadway and seriously injured.

The substantive issue made by the pleadings was whether defendant motorman was guilty of negligence in failing to stop the car in time to avoid the collision, and this negligence was the proximate cause of the injury, the defendants alleging that plaintiff's own negligence was a contributing cause. The jury found for the plaintiff and assessed his damages at the sum of \$4,390. The appeal is from the judgment.

The only question submitted for decision is whether there was any evidence justifying the submission of the case to the jury. The instructions submitted to the jury are not in the record. It is not, therefore, apparent what was the court's view of the rule of law applicable. The theory of counsel for defendants, as presented in their brief, proceeds upon the assumption that the right of the railway company to the use of the

bridge is so far superior to that of another person that when a car is passing over it such other person must give to it the exclusive right of way, or be subject to the imputation of negligence, which will preclude a recovery for any injury which he may sustain from a collision or other accident, unless he can show that the operator of the car has discovered his presence and has failed, when a condition of peril has intervened, to use such means as are in his power to avoid the accident. They insist that the burden was upon the plaintiff to show (1) that his position of peril was discovered by the motorman, and (2) that the latter was able by the use of ordinary care to avoid the accident. In other words, the plaintiff, first by going upon [1] the bridge when a car was approaching him, and, second, by failing to retire from it when his horse became restive and unmanageable, put himself in the position of a trespasser upon the rights of the company, which, for this reason, owed him no duty other than to use ordinary care to avoid injuring him, after his position of peril was discovered. They thus invoke the rule of the last clear chance, and argue that there is no evidence tending to show, either that the motorman discovered the position of plaintiff, or that, if he did, he failed to use ordinary care to avoid the collision. Whether the rule is technically applicable to a case of this kind, we shall not undertake to determine. We do not think plaintiff was guilty of negligence, as a matter of law, either in going upon the bridge, or in remaining on it, though he saw a car approaching. But, accepting the theory of counsel as correct, we nevertheless think the evidence made a case for the jury. It may be summarized, in part, as follows:

The plaintiff had advanced from the north end of the bridge [2] a distance of 300 feet. The horse was a gentle work horse, accustomed to being on the streets when cars were passing. It began to exhibit fright when the car was at a distance of 300 feet away. Passengers upon the car noticed this fact. At that time it did not appear to be under plaintiff's control. It was then "prancing" back and forth across the track. From that point on there was no change in the speed of the car, the motor-



man making no effort to check or stop it. It proceeded at the same rate until it struck the horse. One witness, who was a passenger, stated: "I noticed at the time we were going fast across the bridge. \* \* \* We went as fast as we go on Third street going out to the fort, \* \* \* and on Third street they go as high as twenty and twenty-five miles an hour." This last statement was made by a witness who had theretofore been employed as a motorman by the defendant company. Another witness stated that the plaintiff tried to keep the horse off the track, but that it backed upon it two or three times, and plaintiff could not hold it. This witness testified: "I saw the motorman at that time. He did not do anything at all until, I should say, ten seconds; then he threw the current off. He stood there practically paralyzed, it appeared to me, I should say for about ten seconds. I should not say how far the car had gone past the horse before he threw the current. As to my best judgment upon that, he may have gone thirty feet. Right after he hit the horse he stood still, my recollection is. After he had gone about thirty feet, he threw the handle round like that. At that time he was going at full speed. \* \* \* In my opinion, there was not any lessening of speed from the time I first saw the car at the south end of the bridge until the time that it hit the horse." This witness observed the accident from the upper floor of a building at the north end of the bridge, 400 or 500 feet distant from the place of the accident, but had a clear view. He stated further that the car was 300 feet away when the horse began to be restive. "As the car drew nearer, the horse became more frightened. \* \* \* The horse backed on the track two or three times, but Singer tried to keep him off. Singer could not hold him." A rule of the company requires cars to be moved over the bridge, when teams are upon it, at a speed not to exceed six miles an hour, and at such times the cars must be under complete control. At the time of the accident there were four teams upon the bridge.

The motorman in charge of the car stated that he was drifting at the rate of five or six miles an hour, without power; that he had the car under control; that under such circumstances a

car could be stopped in about forty feet or the length of the car; that he did not see the horse on the track at all; that he first saw it 300 or 400 feet away; that at a distance of thirty feet the horse began to dance toward the track; that he then used all the emergency appliances to bring the car to a stop; that the horse threw up its head and began to dance toward the track, and was struck by the corner of the car as it was about to pass; that he did not know of anything else he could have done to avoid the collision; that in observing the horse he supposed that when it got right to him it would do like lots of other horses and "shoot past" him. A car allowed to drift from the highest point of the bridge without restraint would go at the rate of twenty or twenty-five miles an hour when within 250 feet of the north end of the bridge. Sometimes, when the bridge was clear, the motorman would make up time in crossing. The car was of an improved pattern and fitted with the most approved appliances. The motorman in charge had had an experience of two months, having learned to operate a car within that time. The car struck the horse on the rump with force sufficient to turn it end for end, and threw it off the track into the roadway, killing it. The vestibule of the car was broken in. When the car was finally stopped, it was from 90 to 120 feet beyond the point of collision.

The evidence is voluminous. There is much conflict in the statements of the different witnesses as to the particulars of the incident; but the foregoing statement of it is sufficient to demonstrate that, upon the assumption that plaintiff negligently put himself in a position of peril and remained there, whereas by retreating from the bridge he could have avoided the accident and thus saved himself, there was presented a case for the jury upon the question whether the motorman took such precautions as he ought to avoid the collision, after he discovered plaintiff's perilous position. The facts bring the case clearly within the rule as applied by this court in *Neary v. Northern Pac. Ry. Co.*, 37 Mont. 461, 19 L. R. A., n. s., 446, 97 Pac. 944, and 41 Mont. 480, 110 Pac. 226. Of course, it was not incumbent upon the motorman to stop the car when he first observed the plaintiff

approaching from the north, or even when he observed that the horse was becoming unmanageable. It was nevertheless his duty, when he observed that the horse was likely to carry the plaintiff in front of the car, and therefore into a perilous position, immediately to take such precautions as he could to avoid a collision. The evidence justified a finding that he failed to do so.

The judgment is therefore affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

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STATE EX REL. POWERS, RELATOR, v. DALE, COUNTY CLERK,  
RESPONDENT.

(No. 3,301.)

(Submitted March 4, 1913. Decided April 7, 1913.)

[131 Pac. 670.]

*New Counties—County Seat—Unincorporated Towns—Eligibility.*

1. *Held*, that an unincorporated town was eligible to become a candidate for county seat of a county proposed to be created under Chapter 112, Laws of 1911.

MANDAMUS by the state on the relation of William Powers against J. W. Dale, county clerk and recorder of Valley county. Writ issued.

*Messrs. Norris, Hurd & Lewis*, for Relator; *Mr. Edwin L. Norris* argued the cause orally.

*Mr. D. M. Kelly*, Attorney General, *Mr. Louis P. Donovan*, Assistant Attorney General, *Mr. Thomas Dignan*, and *Messrs. Walsh, Nolan & Scallon*, for Respondent, submitted a brief; *Mr. Wm. Scallon* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

*Mandamus* to the county clerk of Valley county to compel the placing of the name of Bainville upon the ballot as a candidate for county seat at a special election for the creation of the county of Sheridan. Upon the hearing it was ordered that the per-[1] emptory writ issue as prayed. The effect of this ruling was to decide that an unincorporated town is eligible as a candidate for the county seat of a county proposed to be created under the so-called Leighton Act. (Laws 1911, p. 205 *et seq.*) It seems desirable, in compliance with section 6249, Revised Codes, that we give briefly the reasons which have moved us to this conclusion.

The Leighton Act was approved March 6, 1911, and its provisions touching the establishment of the county seat of a proposed new county are: "There shall also be printed upon said ballot the words 'for the county seat,' and the names of all cities or towns which may have filed with the county clerk a petition \* \* \* nominating any city or town within the proposed new county for the county seat, and the voter shall designate his choice for county seat by marking a cross (X) opposite the name of the city or town for which he desires to cast his ballot. \* \* \* In case any city or town fails to receive a majority of all the votes cast, then the city or town receiving the highest number of all votes cast, shall be designated as the temporary county seat. \* \* \* If upon the canvass of the votes cast at such election it appears that sixty-five per cent of the votes cast \* \* \* are for the new county \* \* \* the board of county commissioners shall \* \* \* declare such territory duly formed and created as a county \* \* \* and that the place receiving the highest number of votes cast at said election for county seat shall be the county seat of said county. \* \* \* "

The contention in the brief of respondent is that the term "city or town," as used in the foregoing extract, refers only to an incorporated city or town, for the following reasons: That, to be a city or town, a community must be incorporated, other-

wise it is merely a village or camp; that, whenever the legislature has intended an Act to apply to so-called unincorporated cities or towns, it has explicitly so declared; that, in the absence of a contrary intention, the term "city or town" must be construed with reference to section 3202, Revised Codes, in which it is provided that "a city or town is a body corporate and politic," *etc.*; that there is nothing in the Leighton Act from which it can be reasonably inferred that the term "city or town," as used therein, is not intended to mean an incorporated city or town.

The term "town" has a general and popular, as well as a technical, meaning. In common parlance it has had an almost unvarying significance; derived from the Anglo-Saxon "tun," it originally meant "a collection of houses inclosed by a hedge, wall, or palisade" (Century Dictionary); it still means "any considerable collection of dwelling-houses, as distinguished from the adjacent country" (Standard Dictionary), or "an aggregation of houses so near to one another that the inhabitants may fairly be said to dwell together" (38 Cyc. 506). That it is used in this sense many times in our Codes, and that in the legislative, as well as in the popular, mind there is such a thing as an unincorporated town which is not a mere village or camp, is readily demonstrable. For instance, Chapter 107, Acts of the Twelfth Legislative Assembly (Laws 1911, p. 190), was approved on the same day and was under consideration by the legislature at about the same time as the Leighton Act. Chapter 107 is "An Act providing for bonding fire districts in unincorporated cities and towns," and clearly presents, under the term "unincorporated city or town," the idea of a community entirely beyond the stage of a mere village or camp. So, also, in sections 3514 and 3519 of the Revised Codes, there is a distinct recognition of a town as an entity without incorporation or municipal character. Again, in Article VIII, section 1, the Constitution of Montana provides that the judicial power of the state shall vest in certain enumerated tribunals and such inferior courts as may be established in any "incorporated city or town." This use of the term "incorporated," as applied

to cities and towns, clearly connoting the opposite idea of unincorporated cities or towns, is repeated in sections 3212, 3214, and 3481 of the Revised Codes. It is quite true that in both the Constitution and the Codes the term "city or town" is used without any definite prefix, but under circumstances which make it clear that only incorporated cities or towns is meant; and a further investigation also discloses the frequent legislative use of the term "city or town" without any definite prefix, but under circumstances which would render it absurd to hold that only incorporated cities and towns is meant. Illustrations of this are: Constitution, Article XV, section 12; Chapter 58, Acts of the Twelfth Legislative Assembly; Revised Codes, section 6339, subdivision 10; sections 8483, 8535, 8547, 8548, 8582, 8765, 8771, 8834. It seems clear, therefore, that no consistency whatever has been observed in the legislative use of the term "town"; and it is not correct to say that, whenever an unincorporated town is meant, it has been explicitly so declared, or that the use of the term "town," without the definite prefix, is in all cases intended to be an incorporated town, within the meaning of section 3202. On the contrary, the true inference is that the term "town," as used in the Code, is a term of varying significance, and so uncertain that a construction resting wholly upon it would be highly unsatisfactory.

Accepting, however, as correct the canon of construction proposed by respondent that, where a term has both a technical and a common meaning, the technical meaning must be applied whenever reasonably possible, and assuming that section 3202 is a technical definition for all purposes when the contrary does not appear, we think it is not difficult to see that in the Leighton Act the term "town" is not to be taken in the sense in which it is defined in section 3202. Counsel for respondent say "that the legislature is presumed to know existing statutes and the state of the law." Very well, among the existing statutes, and included in the state of the law when the Leighton Act was passed, may be found the provisions of sections 2851 to 2856, Revised Codes. These provisions date back many years and to a time when incorporated towns in Montana were few and far

between; to a time when county seats were notoriously situated at, or removed from, or moved to, unincorporated towns. These provisions in effect say that a county seat may be moved "from the place where it is fixed, by law or otherwise, to another place"; that, in voting at an election to move a county seat, the elector must vote "for the place" he prefers by marking opposite the name of "the place"; that, if two-thirds of the legal votes cast by those voting on the proposition are in favor of "any particular place," the board must give notice, in which "the place selected" must be declared the county seat. No mention whatever is made in these provisions of a city or town, and no reason whatever appears for holding that, in this proceeding for removing a permanent county seat, the place selected must be an incorporated city or town. So that, if under the Leighton Act only incorporated towns are contemplated as eligible for county seat, we are brought to one of two remarkable situations: Either (1) as to all counties created under that law, the county seat must be an incorporated town, while in all other counties it need not be; or (2) the temporary county seat must be incorporated, but the people of the county may promptly thereafter remove it to a town that is not incorporated. Such a conclusion has no reason apparent or suggested to support it.

Furthermore, three days after the passage of the Leighton Act, there was approved Chapter 135 (Acts of Twelfth Legislative Assembly), which is "An Act to provide for the designation of temporary county seats and for the location of permanent county seats in new counties or in counties in which the permanent county seat has not been located." In this Act we look in vain for the term "city or town," or for any evidence of intention to require incorporation as a qualification for county seat. On the contrary, the language is that the board of county commissioners shall by resolution "designate some place" within the county as temporary county seat, and "the place so designated" shall be the temporary county seat; if the commissioners cannot agree, each shall write the name of the "place" he favors on a slip, and the slips shall be put in a receptacle and one of them drawn out, and the "place" named on the slip so drawn

shall be the temporary county seat. At the succeeding general election, the matter must be submitted to the people, and at such election the elector is required to write on his ballot the name of the "town or place" at which he desires the permanent county seat to be located, and a ballot so marked and cast is to be deemed a vote for the "town or place" so marked; and the "town or place" found to have received a majority of the votes cast shall be the county seat, *etc.* This Act is so nearly contemporaneous with the Leighton Act that the incongruity between its manifest intent and the construction sought by the respondent to be given to the Leighton Act must have been obvious to the legislature, if, as a matter of fact, any such construction of the Leighton Act had occurred to it as possible. If it cannot be supposed that the same session intended results so incongruous upon subjects so intimately related, then we must adopt the only harmonizing conclusion, *viz.*, that neither Act presupposes incorporation as a qualification to become a county seat.

The respondent has failed to suggest any hypothesis, and none has occurred to us, for supposing that to the legislative mind any special reason appealed for preferring an incorporated city or town to one not so endowed. But there is, we think, a consistent purpose to be seen in the Leighton Act to submit the entire matter to the vote of the people, and it is in line with that purpose that we hold the choice of fixing the county seat to be theirs, as among all feasible locations, whether in incorporated towns or not.

It is ordered that the relator have of the respondent his costs herein incurred, which are taxed at \$290.60.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.



STATE EX REL. RYERSON, RELATOR, v. DALE, COUNTY CLERK,  
RESPONDENT.

(No. 3,302.)

(Submitted March 4, 1913. Decided April 7, 1913.)

[131 Pac. 672.]

(For syllabus see *State ex rel. Powers v. Dale, County Clerk, ante*, p. 227.)

MANDAMUS, by the state on the relation of George L. Ryerson against J. W. Dale, county clerk and recorder of Valley county. Writ issued.

MR. JUSTICE SANNER delivered the opinion of the court.

*Mandamus* to the county clerk of Valley county to compel that officer to place the name of Medicine Lake upon the ballot as a candidate for county seat at a special election looking to the creation of the county of Sheridan. The peremptory writ issued after the hearing, our reasons being the same as given in the case of *State ex rel. Powers v. Dale, County Clerk, ante*, p. 227, 131 Pac. 670.

Upon application of the relator, it is ordered that he have of the respondent his costs herein incurred, which are taxed at \$196.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

## MANTLE, RESPONDENT, v. WHITE, APPELLANT.

(No. 3,236.)

(Submitted March 20, 1913. Decided April 9, 1913.)

[132 Pac. 22.]

*Real Property—Trusts—Creation—Insufficiency of Writing—Presumptions—Pleadings—Reply—Estoppel—De Minimis Doctrine.***Real Property—Trusts—Insufficiency of Writing.**

1. *Held*, that an instrument claimed by plaintiff to have created an express trust in real property in his favor, which neither indicated an intention on the part of the plaintiff to create a trust nor showed that defendant was accepting, or acknowledging the existence of, one, nor the purpose of its creation, nor what disposition defendant was to make of the property, was insufficient to constitute the latter a trustee as alleged.

**Same—Presumptions—Statute of Frauds.**

2. From the fact that the subject of an alleged trust was real property, the presumption arises that the creation of it was evidenced by a writing as required by the statute of frauds.

**Same—Evidence—Pleadings—Reply—Estoppel.**

3. Plaintiff having in his reply specifically denied allegations in the answer of defendant claimed by him on appeal to have constituted a sufficient statement to meet the requirements of the rules for establishing an express trust in realty, was not in position to rely upon defendant's pleading to supplement his own insufficient showing in that respect.

**Personal Property—Trusts—Creation.**

4. A trust concerning personal property may be created in parol.

**Appeal and Error—Reversal—De Minimis Doctrine.**

5. Under the maxim "*De minimis non curat lex*," a new trial will not be ordered, even though the cause was tried upon an erroneous theory of the law applicable, where, with the exception of \$2.38, the claims of the plaintiff were offset by those of the defendant.

*Appeal from District Court, Silver Bow County; John B. McClernan, Judge.*

ACTION by Lee Mantle against W. McC. White. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed and remanded, with directions to dismiss complaint.

*Messrs. Maury, Templeman & Davies*, for Appellant, submitted a brief; *Mr. Templeman* argued the cause orally.

Assuming, under Montana practice, the complaint in an action to enforce an express trust in lands need not show an instru-

ment in writing, either creating or declaring the trust, may an express trust in lands be proven by oral testimony in Montana? This court has answered the inquiry in the negative in *Rutherford v. Talent*, 6 Mont. 132, 9 Pac. 821, *Chowen v. Phelps*, 26 Mont. 524, 69 Pac. 54, and *Lynch v. Herrig*, 32 Mont. 267, 80 Pac. 240.

The agreement creating the express trust was denied. The statute of frauds was not pleaded as a defense. It was not necessary under the Montana practice. The defendant may avail himself of such defense. (*King v. Benson*, 22 Mont. 256, 56 Pac. 280; *Christiansen v. Aldrich*, 30 Mont. 446, 76 Pac. 1007; *Marshall v. Trerise*, 33 Mont. 28, 81 Pac. 400; *Mitchell v. Henderson*, 37 Mont. 515, 97 Pac. 942.)

Did the written articles of dissolution of partnership of W. McC. White & Company create or declare an express trust in lands of which the plaintiff may avail himself? They lack the unequivocal intent to create an express trust, without which the writing fails as an express trust instrument. We may pertinently ask here, What is the trust? What is the purpose of the trust? Where are the essentials of an express trust instrument? Where are any signs thereof, and such positive signs as are required by the courts? (See *Skeen v. Marriott*, 22 Utah, 73, 61 Pac. 296; *Learned v. Tritch*, 6 Colo. 432; 3 Words and Phrases, 2611; Pomeroy's Equity Jurisprudence, 3d ed., sec. 1009.) In the case of resulting trusts, or trusts arising by operation of law, the intentions expressed by the parties at the time may not be so material to the court; but in the case of an express trust, as the trial court rules here, unequivocal intent is the cardinal prerequisite proof required by the court in support thereof, and that for the manifest reason the court merely undertakes to carry out the expressed intent, and takes no chance of making a settlement concerning which possibly the settler never dreamed. (*Bliss v. Bliss*, 20 Idaho; 467, 119 Pac. 451, and cases cited.)

If the articles dissolving and settling the partnership affairs did not constitute an express trust, then most clearly does the doctrine of laches apply, since, from the moment of dissolution and settlement effected thereby, Mantle and Warren would have

had the right to get from the defendant their shares, and, conceding the right, it follows that Mantle and Warren had their appropriate remedy in the law. The evidence uncontradictedly shows that neither sought any enforcement of their right for a period of more than sixteen years after private settlement effected,—that is, to the property awarded plaintiff by the trial court, and we know of no enforceable remedy open to them at the time. That the evidence shows plaintiff's right barred by laches is manifested by the following authorities: *Currier v. Studley*, 159 Mass. 17, 33 N. E. 709; *Lendholm v. Bailey*, 16 Colo. App. 190, 64 Pac. 586; *Riddle v. Whitehill*, 135 U. S. 621, 10 Sup. Ct. Rep. 924, 34 L. Ed. 283; *Kendall v. Hackworth*, 66 Tex. 499, 18 S. W. 104.

This court may well hold that whatever action Mantle or Warren had was founded upon the written articles of dissolution. If this be so, and the written articles are the foundation for the right to recover herein, then plainly is plaintiff's action barred by section 6445 of the Revised Codes, which was pleaded as a defense in the answer and urged before the trial court. They plainly gave Mantle and Warren a right to recover their shares forthwith, and the articles themselves would have effectually estopped the defendant from complaining that he held the Mantle shares in trust for any purpose whatsoever. This seems to us to be self-evident, but was not thought of any consequence by the trial court. Our position is that the articles were conclusive upon the parties, since no mistake, fraud or accident is averred or suggested incident to their execution. (See authorities previously cited; and *Holmes v. Hawes*, 43 N. C. 21. See, also, this court's discussion of the subject of limitations in *Schaeffer v. Miller*, 41 Mont. 417, 137 Am. St. Rep. 746, 109 Pac. 970, and *Chowen v. Phelps*, 26 Mont. 524, 69 Pac. 54.)

*Messrs. F. W. Haskins, John H. Smith, Chas. Mattison, and M. J. Cavanaugh*, for Respondent, submitted a brief; *Messrs. Haskins and Cavanaugh* argued the cause orally.

No precise form of words is required to raise a use, and if the words amount to a present contract of sale or bargain, a use is

raised. (*Jackson v. Fish*, 10 Johns. (N. Y.) 466.) No special words or form necessary to raise a trust. (*Throop v. Hatch*, 3 Abb. Pr. (N. Y.) 23.) The written agreement of October 19, 1891, constituted a continuing and executory contract, indefinite as to the terms of its existence, but positive as to the interests in the real estate held by appellant for the benefit of Mantle & Warren. It declared the interests of the parties but was silent as to the time it should be delivered. It could not be executed until a conveyance of the title was made by White; or at least until some act by him amounting to an ouster or repudiation of his trust, brought home to Mantle and Warren. As White before held all the property with the right to sell it for the benefit of the firm, and no change being made in this respect by the writing, sales in his own name as trustee were not inconsistent with the trust relation, and therefore could not start the running of the statute of limitations or laches in his favor. (*Bowes v. Cannon*, 50 Colo. 262, 116 Pac. 339; *San Pedro Lumber Co. v. Reynolds*, 111 Cal. 588, 44 Pac. 309, 311; *Ganley v. Troy City Nat. Bank*, 98 N. Y. 487; *Mantle v. Speculator Min. Co.*, 27 Mont. 473, 71 Pac. 665.) The written agreement was a valid declaration of an express trust for the interests specified therein. (*Compo v. Jackson Iron Co.*, 49 Mich. 39, 12 N. W. 901.) Where there is a writing showing that the legal title is held by one and the equitable title by another, courts will imply a trust from the contract of the parties, though there are no words of trust in the writing. (1 Perry on Trusts, sec. 122; *Petersen v. Taylor*, 4 Cal. Unrep. 49, 33 Pac. 436, 438.)

The writing of October 19 created an express trust, and when it comes to applying to it the statute of limitations, or the doctrine of laches, it must be construed as an express trust. (Pomeroy's Equity Jurisprudence, sec. 1010; *Lane v. Lane*, 8 Allen (Mass.), 350.) If such a trust does not expire by its terms, or is not repudiated, it will continue to exist until the death of the trustee, so that the statute will not run against it until that time. (25 Cyc. 1169; *Shepherd v. Shepherd's Estate*, 108 Mich. 82, 65 N. W. 580; *Jewell v. Jewell's Estate*, 139 Mich. 578, 102 N. W. 1059; *Mabie v. Bailey*, 95 N. Y. 206; *Matter of Underhill*, 1 Con.

541, 9 N. Y. Supp. 455.) There is a class of express trusts that are not expressly declared by the terms of the instrument but which are inferred by a construction of all the terms and conditions. They are all cases where the intention of the parties to create an express trust for some purpose is not expressed unequivocally, but the court infers that was the intention of the parties, from the nature of the transaction, or from the objects and purposes of the agreement. When such a trust is found by the court to exist, it is in every sense an express trust, and has no resemblance whatever to a resulting or constructive trust. To call this class of trusts, as is often done, implied trusts, is not only erroneous, but productive of confusion and mistake. (Pomeroy's Equity Jurisprudence, sec. 1010; *Lane v. Lane*, 8 Allen (Mass.), 350.) The statute of limitations does not run against express trusts, for the reason that the possession of the trustee is the possession of the *cestui que trust*, nor does the doctrine of laches apply. (*White v. Costigan*, 138 Cal. 564, 72 Pac. 178.) An express trust need not be created by a writing but only manifested by a writing; for if there be written evidence of the trust, the danger of parol evidence against which the statute is directed is effectually removed. (Perry on Trusts, sec. 79.) An admission in a verified answer is sufficient to create a trust. (*Stanton v. Quinan*, 91 Cal. 1, 27 Pac. 517.)

That the writing was sufficient to create an express trust, see *Urann v. Coates*, 109 Mass. 581, 117 Mass. 41; *Petersen v. Taylor*, 4 Cal. Unrep. 49, 33 Pac. 436, 437; 1 Perry on Trusts, sec. 122.

Does the complaint state a cause of action? Though the trust pleaded was required by law to be in writing, it was not necessary, as claimed by the defendant, to allege it was in writing. The general rule is that where a complaint sets out the terms and conditions of an agreement and the violation of that agreement is charged against the defendant, if it is such an instrument as the law requires to be in writing, and the complaint is silent as to whether it was oral or in writing, courts will presume it was a lawful written instrument, until the contrary appears. (*Van Doren v. Tjader*, 1 Nev. 380, 90 Am. Dec. 498.) Where it is alleged in a complaint that an agreement is en-

tered into, if the law requires such an agreement as is alleged to be in writing, it will be presumed that the agreement alleged is in writing, and the complaint will not be subject to a general demurrer. (*Hefferlin v. Karlman*, 29 Mont. 139, 74 Pac. 201; *Sweetland v. Barrett*, 4 Mont. 217, 1 Pac. 745; *Mayger v. Cruse*, 5 Mont. 485, 6 Pac. 333.) In the absence of allegations showing a parol agreement on the face of the complaint, the trust agreement will be presumed to be in writing. (*Broder v. Conklin*, 77 Cal. 330, 19 Pac. 513; *Feeney v. Howard*, 79 Cal. 525, 12 Am. St. Rep. 162, 4 L. R. A. 826, 21 Pac. 984; *Wakefield v. Greenhood*, 29 Cal. 597; *Swenson v. Swenson*, 17 S. D. 558, 97 N. W. 845.)

Delay alone is not laches. During the delay some new condition must intervene which would render the enforcement of the trust, otherwise unimpeachable, contrary to the principles of equity. (*Du Bois v. Clark*, 12 Colo. App. 220, 55 Pac. 750.) Neither laches, waiver nor acquiescence can be predicated upon mere delay, where the plaintiff did not have a knowledge of the facts giving him a right to commence his action; and no conduct of his, which otherwise might be sufficient to show an election, can be so construed, if at the time he was ignorant of his rights. (24 Am. & Eng. Ency. of Law, 2d ed., p. 626.) The burden of proving laches and the facts giving rise to his right to relief on this ground is on the defendant. (*Baker v. Lever*, 67 N. Y. 304, 23 Am. Rep. 117; *Baker v. Spencer*, 47 N. Y. 562; *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. 922, 940.) Laches will not be imputed to a *cestui que trust* because of his failure of action, so long as the acts of the trustee are consistent with his duty under his trust. (*Carter v. Uhlein* (N. J.), 36 Atl. 956.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Prior to October 1, 1891, Lee Mantle, Charles S. Warren, W. McC. White, and L. C. White were copartners doing business in Silver Bow county as W. McC. White & Co. On October 19, 1891, the partners executed an instrument in writing, as follows:

"On the first day of October, A. D. 1891, the firm of W. McC. White & Co. was dissolved by mutual consent, Lee Mantle and Charles S. Warren retiring therefrom. In settlement made, Lee Mantle and Charles S. Warren have paid jointly  $\frac{4}{9}$  of the net liabilities of the firm less credits to their accounts; the balance paid amounting to \$1,487.59. Said Mantle and Warren shall receive  $\frac{4}{7}$  of an undivided  $\frac{1}{4}$  interest in the Montana Avenue Addition; also  $\frac{4}{7}$  of an undivided  $118\frac{7}{8}$  acres in the south  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of section 29 and the north  $\frac{1}{2}$  of sec. 32, T. 3 N. R. 7 W., same being subject to a mortgage from McC. White et al. to Frederick Cook and James O'Brien which is offset by a mortgage E. A. Macrum to W. McC. White et al.; also  $\frac{4}{7}$  of \$625.00 and 2 yrs. int. on same due July 15, 1892; also  $\frac{4}{9}$  undivided interest in the Bottle Placer comprising the N. E. of sec. 25  $\frac{3}{8}$ , same being subject to the proportion of pledged payment of \$1,000 in the event of sale thereof; also  $\frac{4}{9}$  interest in \$500 note of W. K. Quarles,  $\frac{4}{9}$  of 30 shares stock Security Abstract Co.,  $\frac{4}{9}$  of 500 shares stock Butte Sewer Pipe & Tile Co., &  $\frac{4}{9}$  of \$100 bond of the Silver Bow Club."

Some time in 1908 this suit was commenced by Mantle, as the successor of the Mantle and Warren interests, to have McC. White declared to be a trustee of certain of the properties originally held by the copartnership, and for an accounting. It is alleged that at the time of the dissolution it was agreed by Mantle and Warren, on the one hand, and McC. White, on the other, that the record title to the Mantle and Warren interests should be held by White in trust for the use and benefit of Mantle and Warren, and that White should upon demand convey the property to Mantle and Warren, or to such person or persons as they might nominate. The assignment of the Warren interest and a demand upon and refusal by the defendant are then pleaded, followed by the prayer. Defendant White in his answer sets forth a copy of the writing of October 19, 1891; he denies the creation of any trust and alleges, as affirmative defenses, (1) the substitution of a new agreement by which all the property rights of the members of the copartnership were determined and a complete adjustment and settlement made,



and (2) he pleads the bar of the statutes of limitation. Issues were joined upon the affirmative allegations of the answer, and a trial to the court without a jury had, which resulted in findings and judgment in favor of the plaintiff. From that judgment and an order denying him a new trial, the defendant appealed.

There are some twenty-eight findings of fact and nine separate conclusions of law by the trial court, but they are all made to hinge upon the determination of a single question raised by the lower court's first conclusion of law, which reads as follows: "That by operation of the written agreement of October 19, 1891, admitted in the pleadings, the defendant became the trustee of an express trust of the property, real and personal, mentioned in said agreement and allotted to the plaintiff and Chas. S. Warren." Did this memorandum constitute White a trustee of an express trust in favor of Mantle and Warren? If it had been executed since the adoption of our Codes in 1895, it is very clear that it would not have the effect attributed to it by the trial court, for it fails altogether to meet the requirements of the rules which the Codes prescribe. The Codes declare: "A trust is either (1) voluntary; or (2) involuntary." (Rev. Codes, sec. 5364.) "A voluntary trust is an obligation arising out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another." (Sec. 5365.) "An involuntary trust is one which is created by operation of law." (Sec. 5366.) "The person whose confidence creates the trust is called the trustor; the person in whom the confidence is reposed is called the trustee; and the person for whose benefit the trust is created is called the beneficiary." (Sec. 5367.) "Subject to the provisions of section 4537, a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty: (1) An intention on the part of the trustor to create a trust; and (2) the subject, purpose and beneficiary of the trust." (Sec. 5370.) "Subject to the provisions of section 4537, a voluntary trust is created, as to the trustee, by any words or acts of his indicating, with reasonable certainty: (1) His acceptance of the trust, or his ac-

knowledge, made upon sufficient consideration, of its existence; and (2) the subject, purpose and beneficiary of the trust." (Sec. 5371.) "No trust in relation to real property is valid unless created or declared: (1) By a written instrument, subscribed by the trustee or by his agent thereto authorized by writing; (2) by the instrument under which the trustee claims the estate affected; or (3) by operation of law." (Sec. 4537.)

At the time the writing was executed, section 217, Fifth Division, Compiled Statutes of 1887, was in force. So far as applicable that section provides: "No \* \* \* trust \* \* \* concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing." A review of the authorities will disclose that, so far as applicable to the facts of this case, no appreciable change in the rules of law was wrought by the adoption of our Codes. Indeed, it was the general purpose of the Codes to crystallize in concrete form the rules of law as they already existed.

After referring to the rule under the statute of frauds requiring a trust concerning real estate to be created, manifested or proved by writing, the author of the article on Trusts, in 39 Cyc. 57, says: "While it is essential to the creation of a trust that there be an explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created, no formal, technical, or particular words are necessary, but it is sufficient if an intention to create a trust and the subject matter, purpose and beneficiary are stated with reasonable certainty. Indeed, the use or nonuse of the technical words 'trust' and 'trustee' is not controlling, although it will be given weight, it being held that their absence does not prevent a declaration of trust from being sufficient, and that their use is not of itself sufficient to create a trust. Where no intent to create a trust appears, none will be held to exist, regardless of the form of words used." The same doctrine is stated in 28

American and English Encyclopedia of Law, second edition, 879, as follows: "The statute requires that the written evidence, although it need not be expressed in formal or technical language, must be sufficient to establish the whole trust; not only that there is a trust, but what it is. It should identify the property or interests to which the trust relates, or should afford means by which that identity may be made certain, and it should disclose the terms of the trust."

In 1 Beach on Trusts and Trustees, section 40, it is said: "But while no form of words is prescribed, or is essential, the instrument by which the creation of a trust is manifested must be properly executed, and it must set forth with sufficient clearness and definiteness the intention to create a trust. The writing must show, not only that a trust of legal estate was created, but it must indicate also the nature and terms of the trust."

In 1 Perry on Trusts and Trustees, section 82, the same rules are stated as follows: "Any agreement or contract in writing, made by a person having the power of disposal over property, whereby such person agrees or directs that a particular parcel of property or a certain fund shall be held or dealt with in a particular manner for the benefit of another, in a court of equity raises a trust in favor of such other person against the person making such agreement, or any other person claiming under him voluntarily or with notice; and the statute of frauds will be satisfied if the trust can be manifested or proved by any subsequent acknowledgment by the trustee, as by an express declaration, or any memorandum to that effect, or by a letter under his hand, or by his answer in chancery, or by his affidavit, or by a recital in a bond or deed, or by a pamphlet written by the trustees, or by an entry in a bank deposit book; in short, by any writing by which the fiduciary relation between the parties and its terms can be clearly read."

In Flint on Trusts and Trustees, section 34, it is said: "No particular expressions are necessary to create a trust; any language clearly showing the settler's intention is sufficient if the objects, property, and the disposition of it are definitely stated; and the statute will be satisfied if the trust can be manifested

or proved by any subsequent acknowledgment by the trustee, as by an express declaration by him, or any memorandum to that effect, or a letter by him, or his answer in equity, or his affidavit, or a recital in a bond, or deed, or pamphlet, by the trustee; finally by any writing showing the fiduciary relation of the parties and the conditions of it."

Tested by these general rules which were in force at the time the writing of October 19, 1891, was executed, or by the rules prescribed by the Code, and the result is the same. There is not the slightest indication in the writing that Mantle and Warren, or either of them, intended to create a trust. Neither is there any intimation by White that he was accepting a trust or acknowledging the existence of one. And it certainly cannot be insisted that this writing reveals the purpose for which this trust was created, if created at all. No one would have the temerity to say that this writing discloses upon its face that White was to make any disposition of the Mantle and Warren interests. The fair, reasonable construction to be given to the language employed in the writing would tend rather to establish that it was the purpose of all the parties to dissolve whatever relationship of trust or confidence existed by virtue of the partnership, and to reduce the parties to the condition of strangers dealing with each other at arm's length.

It will not do for respondent to urge his suggestion that, if the evidence fails to establish an express trust, it may be sufficient to constitute the transaction a constructive or resulting trust. There is not anything in the pleadings to justify such a conclusion. The complaint counts upon an express trust; and while the particular character of the transaction by which the alleged trust was created is not revealed by the complaint, from the [2] fact that the trust—if one was created—had to do with real property, the presumption arises that such trust, if created by the voluntary act of the parties, was evidenced by an instrument in writing in conformity with the provisions of our statute of frauds. (*Hefferlin v. Karlman*, 29 Mont. 139, 74 Pac. 201; *Sweetland v. Barrett*, 4 Mont. 217, 1 Pac. 745; *Mayger v. Cruse*, 5 Mont. 485, 6 Pac. 333.) The record discloses that plaintiff

relied upon this written instrument of October 19, 1891, and the trial court made it the basis of its decree.

It is also suggested in the brief of respondent that there is a [3] sufficient statement in the verified answer of this defendant in the court below to meet the requirements of the rules for establishing an express trust; but in this respondent overlooks three important facts: (1) If the answer be accepted as establishing a trust, it is a trust for a purpose altogether different from that which the court found was created; (2) the respondent in his reply specifically denied the allegations in the answer, upon which he now relies for assistance; and (3) the trial court found that those allegations in defendant's answer were not true. In the light of these facts it ill becomes respondent to make this suggestion.

While there is no magic in the word "trust" or "trustee," and any agreement, however informal, which indicates with reasonable certainty the intention of the trustor to create a trust, the acceptance or acknowledgment thereof by the trustee, and the subject, purpose, and beneficiary, will be held to be sufficient, still this court cannot change the law in aid of a litigant. Every element essential to the creation of a trust is wanting in this writing, and to hold it sufficient involves the necessity of writing or reading into it provisions not found there, and to that extent making for the parties a contract materially different from the one they made for themselves. And the reason for the rules applied here is not wanting. In the light of the facts of this particular case, the righteousness of those rules is apparent. For more than sixteen years this plaintiff permitted the defendant to pay all the taxes upon the lands in dispute and stood by without protest, and saw him handle the property in controversy as his own; and now, after the lapse of all these years, without explanation for his delay, he seeks to avoid the defense of laches or the defense of the bar of the statutes of limitation by claiming that the defendant during all those years was the trustee of an express trust for his use and benefit. It was doubtless to prevent the assertion of just such stale demands as this, under the guise of the enforcement of a trust, that the rule was

adopted that the evidence of such relationship shall be direct and certain (*Sheehan v. Sullivan*, 126 Cal. 189, 58 Pac. 543); and, if it concerns real estate, that it shall have the added stability furnished by a writing.

In so far as the plaintiff seeks to establish an express trust concerning real estate, he fails altogether. A trust concerning [4] personal property might have been created in parol (*Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659); but the trial court as well as the parties apparently proceeded upon the theory that the rights of the parties were to be determined altogether by the writing of October 19, 1891. The theory adopted was an [5] erroneous one, and a retrial of the cause, so far as it affects the personal property, upon a correct theory would be required, but for the fact that the findings and conclusions of the trial court disclose that upon the disposition of the shares of stock in the Butte Sewer Pipe and Tile Company, and the note for \$625 and interest, the only items of personal property in controversy, the rights of the parties plaintiff and defendant are substantially equal, and that the claims of one are offset by the claims of the other. The difference amounts to about \$2.38, and is insufficient to justify any further court proceedings under the maxim "*De minimis non curat lex.*"

The judgment and order are reversed, and the cause is remanded to the district court, with direction to dismiss the complaint.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

Rehearing denied May 5, 1913.

## BENNETT, RESPONDENT, v. QUINLAN, APPELLANT.

(No. 3,237.)

(Submitted March 21, 1913. Decided April 15, 1913.)

[131 Pac. 1067.]

*Water Rights—Adverse Claims—Complaint—Sufficiency—Res Adjudicata—Parol Evidence—Presumptions—Parties—Statutes.*

**Water Rights—Adverse Claims—Complaint—Sufficiency.**

1. The complaint in an action to determine conflicting claims to a water right, alleging that plaintiff was the owner of an undivided one-half interest in said right and that defendant claimed an interest therein adverse to that of plaintiff, but that such claim was without right, was sufficient to put the defendant upon his defense.

**Same—Determination of Rights of Defendants *Inter Sese*—*Res Adjudicata*—Presumptions—Parties—Statutes.**

2. The provision of section 4852, Revised Codes, that in a water right suit the plaintiff may make any and all persons who have diverted water from the stream in controversy parties, and the court may in one judgment settle the rights of all of them in one decree, being permissive only, there was no presumption that the respective interests of joint owners in an undivided water right had been adjudicated *inter sese* in a suit in which their predecessors were codefendants, in the absence of a showing to that effect upon the face of the decree or the judgment-roll.

**Same—*Res Adjudicata*—Decree—Parol Evidence—Admissibility.**

3. Where, because of the loss or destruction of the record in a water right suit (with the exception of the findings and decree), it was impossible to determine whether the respective rights of two codefendants had been adjudicated *inter sese*, the trial court in a subsequent action between their successors properly admitted parol evidence to determine what rights had been determined in such action.

**Same—Decree—Joint Interest—Presumptions.**

4. The presumption, if any, that where parties were by decree awarded a joint interest, without specifically fixing the extent of the interest of each, they were each entitled to an equal share therein, was not conclusive, as between their successors in interest who had full knowledge of the extent of the rights of their predecessors, but *prima facie* only.

*Appeal from District Court, Powell County; Geo. B. Winston, Judge.*

**ACTION** by James H. Bennett against H. J. Quinlan. From a judgment for plaintiff and an order denying him a new trial, defendant appeals. Affirmed.

*Mr. J. H. Duffy*, and *Mr. W. A. Pennington*, for Appellant, submitted a brief and argued the cause orally.

*Mr. S. P. Wilson* and *Mr. John H. Tolan*, for Respondent, submitted a brief and argued the cause orally.

A matter will not be considered as *res adjudicata* unless it appears from the judgment or from the judgment-roll to have been adjudicated. (*Sloan v. Byers*, 37 Mont. 503, 97 Pac. 855; *McNinch v. Crawford*, 30 Mont. 297, 76 Pac. 698; *Whited v. Cavin et al.*, 55 Or. 98, 105 Pac. 396; *Farnham on Water*, p. 21; *Hough v. Porter*, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728.) He who claims matter to have been adjudicated has the burden of proving such adjudication. (*Kleinschmidt v. Binzel*, 14 Mont. 31, 43 Am. St. Rep. 604, 35 Pac. 460; *Packett v. Sickles*, 5 Wall. (U. S.) 592, 18 L. Ed. 550; *Russel v. Place*, 94 U. S. 608, 24 L. Ed. 214; *Glass v. Basin & Bay State Min. Co.*, 34 Mont. 88, 85 Pac. 746; *Rudd v. Cornell*, 171 N. Y. 114, 63 N. E. 823; *Reynolds v. Aetna Life Ins. Co.*, 160 N. Y. 635, 55 N. E. 305; *State v. Kaemmerling*, 83 Kan. 383, 111 Pac. 443; *Savage v. City of Tacoma*, 61 Wash. 1, 112 Pac. 78; *Evans v. Swan*, 38 Colo. 92, 88 Pac. 149; *O'Neil v. Fort Lyon Canal Co.*, 39 Colo. 487, 90 Pac. 849; *Waterhouse v. Levine*, 182 Mass. 407, 65 N. E. 822; *Water Commrs. v. Cramer*, 61 N. J. L. 270, 68 Am. St. Rep. 705, 39 Atl. 671; *Aetna Life Ins. Co. v. Board of Commrs.*, 117 Fed. 82, 54 C. C. A. 468; *Grand Valley Irr. Co. v. Fruita Imp. Co.*, 37 Colo. 483, 86 Pac. 324; *Bond v. Markstrum*, 102 Mich. 11, 60 N. W. 282; *In re Wilson's Estate*, 147 Cal. 108, 81 Pac. 313; *Keagy v. Wellington Nat. Bank*, 12 Okl. 33, 69 Pac. 811; *Draper et al. v. Medlock*, 122 Ga. 234, 2 Ann. Cas. 650, 69 L. R. A. 483, 50 S. E. 113; *Ortiz v. First Nat. Bank of Las Vegas*, 12 N. M. 519, 78 Pac. 529; *Harrison v. Remington Paper Co.*, 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (n. s.) 954; *Beronio Vesven Co. v. L. Co.*, 129 Cal. 323, 79 Am. St. Rep. 118, 61 Pac. 958; *Wiltrout v. Showers*, 82 Neb. 777, 118 N. W. 1180; *Logan v. Trayser*, 77 Wis. 579, 46 N. W. 877; *Jones v. Vert*, 121 Ind. 140, 16 Am. St. Rep. 379, 22 N. E. 882; *Koelsch v. Mixer*, 52 Ohio St. 207, 39 N. E. 417; *Hoffman v.*



*Silverthorn*, 137 Mich. 60, 100 N. W. 183; *Sanford v. King*, 19 S. D. 334, 103 N. W. 28; 23 Cyc 1279, 1532.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to have determined the extent of the respective interests of the plaintiff and defendant in a water right acquired by their predecessors by appropriation for agricultural purposes from Race Track creek, formerly in Deer Lodge, now in Powell county. The original appropriation was small, and was made by John Duncan in 1871. It was enlarged to 400 inches by Duncan and L. Strickland in 1872; the diversion being completed on June 5 of that year. They each held a possessory right upon the public lands lying along the south side of the stream. They made the appropriation jointly, and constructed a ditch which they used in common to a point at which a change in the direction became necessary in order that each might convey the amount of water needed to his own lands. From this point each constructed his own ditch. Title to the lands held by them, respectively, was subsequently acquired by them or their respective successors by patent directly from the federal government or by deed from the Northern Pacific Railroad Company. In 1881 one Magone succeeded Strickland in his right to a portion of the lands then held by him, and to his entire interest in the water right and ditch. Magone subsequently acquired other lands. On April 1, 1910, the plaintiff purchased substantially all of his holdings, including his interest in the water right described in the conveyance as an undivided one-half interest. In 1884 John and Henry Quinlan succeeded by purchase to the rights and interests of Duncan, including that held by him in the ditch and water right. The defendant, a son of Henry Quinlan, thereafter became, and when this action was brought and tried was, the owner of the Duncan interests by conveyance from his father and John Quinlan. In 1887 Magone and the two Quinlans, desiring to cultivate portions of their land lying upon the slope above the Strickland-Duncan ditch, jointly constructed a second ditch from a point on the

creek about three and one-half miles above the head of the Strickland-Duncan ditch. They used this in common, just as they did the old ditch, down to a point at which it became necessary for each to construct a branch for his own use. The diversion through this ditch was not, nor was it intended to be, an additional appropriation. The water diverted through it was used under the old right. In 1890 an action was brought by one P. H. Meagher, who owned lands lying on Race Track creek near the Magone and Quinlan lands, and also claimed prior right to the use of water from the creek, to have the relative priorities of all the rights appropriated from it settled and determined. This case is referred to in the pleadings and evidence under the title of *Meagher v. Glover et al.* All the claimants of rights from the creek were made parties defendant, including Magone and the Quinlans. The court found the dates and amounts of the respective appropriations, and on July 22, 1890, rendered a decree determining the rights and priorities of all of the parties accordingly. With reference to the Magone-Quinlan right the court found: "(1) That the said defendants in the year 1871 appropriated of the waters of Race Track creek, described in plaintiff's complaint, 400 inches thereof, measured as provided by the statutes," etc. "(2) That said water was appropriated by means of a ditch of sufficient capacity to convey said amount of water." The decree, after reciting that the cause was heard upon the complaint, the separate answers of the several defendants, and "the stipulation on file herein," adjudged that "the plaintiff and each of the defendants are the owners and entitled to the use of the waters of Race Track creek, \* \* \* said waters to be diverted from said creek \* \* \* in the order and manner hereinafter named: \* \* \* (8) John Quinlan, Henry Quinlan, and Ed Magone, four hundred inches. \* \* \* That the water be measured according to the statutes of the state of Montana for the measurement of water." It further ordered and adjudged "that the plaintiff and each of the defendants, in the order named, have the right to the use of the waters of Race Track creek for the purposes of irrigation, domestic use, and for watering stock. That the defendants and each of them

are hereby enjoined and restrained forever from diverting or interfering with the waters of said creek, except that each of said defendants may in the order named make reasonable use thereof in the amount named and for the purposes mentioned, and until each defendant has used the water in the manner and amount mentioned [and] each other defendant is restrained from using or diverting the same."

The complaint contains two counts. In the first the plaintiff bases his claim to an undivided one-half interest upon the decree. He alleges that defendant claims adversely to him, and under such claim is interfering with the use and enjoyment of his right. In the second count he alleges title and right to the use of an undivided one-half interest, and an adverse claim by defendant which is without right. The prayer is for a decree declaring that the plaintiff is the owner of an undivided one-half interest, and that defendant's adverse claim be adjudged to be without foundation. In his answer to the first count defendant admits the existence and validity of the decree; but denies that plaintiff by the terms thereof is entitled to an undivided half interest in the amount awarded therein to the predecessors of the plaintiff and defendant, or any other or greater interest than one-third, or 133 $\frac{1}{3}$  inches. He denies all of the allegations of the second count, except that he asserts an interest adverse to plaintiff to the extent of the difference between a one-half and a one-third interest, and pleads the decree as an adjudication that Magone and the two Quinlans were each the owner and entitled to a one-third interest, and alleges that defendant is estopped thereby to claim any other or greater interest. There was issue by reply.

The substantive question presented to the district court for determination was whether the decree of July 22, 1890, was to be taken as a conclusive adjudication of the extent of the rights of Magone and the two Quinlans *inter sese*, and hence those of plaintiff and defendant, their successors, or whether it should be construed by the aid of extrinsic evidence and their rights declared accordingly. The court held that, since the decree does not upon its face appear to have adjudicated the rights of

these parties and such adjudication was not actually or necessarily included in it, their respective interests were to be ascertained from evidence of the facts as they actually existed when the right was initiated and when the decree was rendered. Accordingly, over objection of defendant, it heard the evidence, found in favor of plaintiff, and adjudged him to be the owner of an undivided one-half interest. The defendant has appealed from the decree and an order denying him a new trial.

The integrity of the decree is assailed on the grounds (1) that the complaint does not state facts sufficient to constitute a cause of action; and (2) that the former decree was an adjudication of the interests of the parties *inter sese*, and that the court erred in not accepting it as such. The first contention may be dismissed with the remark that, whatever may be its merits when referred to the first count in the complaint, it must be overruled as to the second count. As appears from the foregoing statement, it is alleged therein that the plaintiff is [1] the owner of the property described, that defendant claims an interest therein adverse to that of plaintiff, and that such claim is without right. This is sufficient to put the defendant upon his defense. (*Montana Ore Pur. Co. v. Boston & Mont. C. etc. Co.*, 27 Mont. 288, 70 Pac. 1114; *Merk v. Bowery Min. Co.*, 31 Mont. 298, 78 Pac. 519; *Castro v. Barry*, 79 Cal. 443, 21 Pac. 946; 17 Ency. Pl. & Pr. 326; 2 Pomeroy's Equitable Remedies, sec. 741.)

The second contention is equally without merit. Section 7917, Revised Codes, provides: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." Section 4852 is in part [2] as follows: "In any action hereafter commenced for the protection of rights acquired to water under the laws of this state, the plaintiff may make any or all persons who have diverted water from the same stream or source parties to such action, and the court may in one judgment settle the relative

priorities and rights of all the parties to such action." If this latter provision were to be taken as mandatory, the defendant might well insist that the decree in the case of *Meagher v. Glover* was to be accepted, not only as an adjudication of the amounts and priorities of the different appropriations mentioned therein, but also of the rights of joint owners in any appropriation *inter sese*. But, as pointed out in *Sloan et al. v. Byers et al.*, 37 Mont. 503, 97 Pac. 855, the terms of this provision are permissive only. Therefore, though the rights of all the parties—whether arising out of joint or independent appropriations—may be adjudicated in a single decree under the rule declared by section 7917, *supra*, no presumption attaches that any such adjudication has in fact been had, unless the fact appears upon the face of the decree itself, or, in any event, from the judgment-roll. True, it was said in *McNinch v. Crawford*, 30 Mont. 297, 76 Pac. 698, that in an action brought under section 4852, *supra*, each party is an antagonist of every other party. This statement was made with reference to the condition of the issues presented in that case and is to be so taken and understood, and not to mean that in such an action every possible right touching the subject matter in controversy is to be presumed to have been adjudicated by the final decree, whether it was put in issue or not, or whether it was necessarily involved in the issues tried. As was suggested in *Sloan et al. v. Byers et al.*, *supra*, it is doubtful whether the legislature has power to compel parties to litigate their rights when neither questions that of the other nor has committed a wrong with reference to it, for which the other is demanding redress. Hence in *Sloan et al. v. Byers et al.*, inasmuch as neither the decree nor the judgment-roll in a former controversy over the water in the same stream showed that the extent of the interests of joint owners *inter sese* in the particular right in question had in fact been adjudicated, it was held that the decree in the former action did not estop the parties thereto from having these rights adjudicated in a second action. In that case the entire record in the former action was before the court at the hearing. In the case at bar it was shown that the record

in the case of *Meagher v. Glover*, except the findings and decree, [3] had been lost or destroyed. It cannot be determined from an examination of these remnants of the record that Magone and the Quinlans interpleaded each other, or that there was any controversy between them as to the extent of their rights *inter sese*. Indeed, so far as they furnished a basis for any inference, it is that the court adjudicated to them a common right in the ditch and water both, without regard to the extent of their individual interests. The findings refer to the right as a single entity—the property of all of these defendants. The decree refers to it in the same way; whereas, if they had interpleaded each other and had submitted their rights to the court for adjudication, the decree would undoubtedly have said so in unmistakable terms. It is true that the introductory recitals in the decree state that the cause was heard upon the complaint, the separate answers of the defendants, and “the stipulation on file herein,” but when we note that in the enumeration of the several rights adjudicated—thirty-five in all—several of them were jointly awarded to two or more persons, we do not think that statement imports into the adjudging portion of the decree any greater certainty. The court, having found itself thus left without evidence in the record to enable it to ascertain the issues made and tried, properly refused to accept the decree as conclusive, and held that recourse must be had to parol evidence to ascertain what in fact had been adjudicated by it, and that, if the Magone and Quinlan rights had not been determined, it was incumbent upon it to determine them. (*Kleinschmidt v. Binzel*, 14 Mont. 31, 43 Am. St. Rep. 604, 35 Pac. 460.)

In *Russell v. Place*, 94 U. S. 608, 24 L. Ed. 214, in speaking of the admissibility of parol evidence to show what issues had been tried in a former controversy, the court said: “It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that

the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudications actually made, when the record leaves the matter in doubt, such evidence is admissible." This case is cited, with others to the same effect, in *Kleinschmidt v. Binzel*, and the above paragraph is therein quoted with approval.

There was scarcely any conflict in the evidence as to what the facts were, either as to the issues tried in *Meagher v. Glover*, or as to what the relative rights of Magone and the Quinlans *inter sese* were, and hence what are those of the plaintiff and the defendant. The court found that Magone and the Quinlans made common cause as against all the other parties, but that as among themselves there was no controversy whatever. There is no complaint, nor is there any foundation for any, that the findings are not supported by the evidence.

Counsel say in their brief that, inasmuch as the decree in *Meagher v. Glover* adjudged the right to Magone and the Quin-[4] lans jointly, the legal presumption attaches that their shares were equal, and that, since the defendant acquired the Quinlan interests by purchase, the presumption is conclusive that he thus became the owner of a two-thirds interest. They invoke the rule recognized generally in this country that when two or more parties acquire an estate by the same act, deed, or devise, and no indication is therein made to the contrary, they are presumed to hold as tenants in common (*Washburn on Real Property*, sec. 878), and insist that the decree should, for this reason, have been accepted as conclusive. As we have already pointed out, the decree does not on its face purport

to adjudicate the rights of the parties *inter sese*. This made it incumbent upon the district court to ascertain what issues were determined, and to determine such as it appeared were not within the issues tried in that case. The title of the parties did not vest under the decree in any sense of the term "vest." The question as to the extent of the interests of the parties was thus left at large, to be determined by reference to the evidence showing the inception of the interests, *viz.*, the original appropriation, and the rights claimed and conceded by each of the joint owners up to the date of the decree and subsequent to that time. The court found, in effect, that the extent of the interest acquired by the predecessor of plaintiff under the original appropriation was an undivided one-half. There is no conflict in the evidence on this point. While the findings are not specific as to what the course of conduct observed by the parties subsequent to the date of the appropriation was, the evidence is clear that Duncan and Strickland each claimed for himself, and conceded to the other, a one-half interest; that Magone on the one hand, and the Quinlans on the other, after they had acquired the interests of these appropriators, made the same claims and concessions, and that no claim was made by anyone to the contrary until long after the decree was rendered. Indeed, neither Henry nor John Quinlan ever questioned the extent of Magone's right. It was first seriously questioned by the defendant after he had succeeded to the Quinlan interests, and then only after the plaintiff had acquired the Magone interest.

Let it be assumed, however, that the decree furnished a basis for the presumption that Magone and the Quinlans were entitled to a one-third interest each. As between them, this presumption was *prima facie* only, and could be overturned by evidence showing the facts. (*Shiels v. Stark*, 14 Ga. 429; *Edwards v. Edwards*, 39 Pa. 369; 38 Cyc. 74.) Though a different rule might apply to persons who purchased from them without notice of the actual condition of the title, and on this point we express no opinion, the evidence shows that both the plaintiff and the defendant at the date of the conveyances un-



der which they hold had full knowledge of the extent of the rights of their predecessors. Therefore, the presumption was only *prima facie* as to them.

The judgment and order are affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

Rehearing denied May 5, 1913.

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MOSS, RESPONDENT, v. GOODHART, APPELLANT.

(No. 3,239.)

(Submitted March 22, 1913. Decided April 15, 1913.)

[131 Pac. 1071.]

*Corporations—National Banks—Receivers—Action by Stockholder—Complaint—Demand for Redress—Upon Whom—Appeal and Error—Theory of Case—Equity—Instructions—Evidence—Erroneous Admission—Presumptions—Cross-examination—Scope.*

**Appeal and Error—Theory of Case—Equity—Instructions.**

1. Where appellant acquiesced in the trial of a cause as a suit in equity, he was bound on appeal by the theory thus adopted, and was therefore not in position to complain of alleged error in giving or refusing instructions to the jury.

**Equity—Instructions—General Verdict—Submission to Jury Erroneous.**

2. In an equity case tried with a jury, only the formal instructions should be given, and a general verdict should not be submitted.

**Same—Evidence—Erroneous Admission—Presumptions—Appeal.**

3. On appeal in an equity suit, the presumption obtains that the district court in arriving at its decision disregarded any erroneously admitted evidence, unless it appears that it influenced the decision in some material aspect.

**Corporations—National Banks—Receivers—Stockholder's Action—Demand—Complaint.**

4. The rule that to entitle a stockholder to prosecute an action for redress of an injury to the corporation, as distinguished from one which he himself has suffered, he must allege that he has made demand upon the corporate authorities (or the receiver in charge) to act, or make it apparent that a demand upon them (or him) would have been useless, is applicable to national banks; in case of such

a corporation he must allege demand upon the board of directors, the receiver or the controller of the currency.

**Evidence—Complaint—Insufficiency—When Treated as Amended.**

5. Where evidence is admitted, without objection, in aid of a fact necessary to state a cause of action but not alleged in the complaint, the pleading will, after judgment, be treated as amended to admit such proof.

**Same—Cross-examination—Scope.**

6. The right of cross-examination is a substantial one, and should not be unduly restricted, but the fullest scope should be allowed to the end that the jury may be advised of all facts having a legitimate bearing upon the issues presented.

*Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.*

ACTION by P. B. Moss against Richard W. Goodhart. From a judgment for plaintiff and an order denying him a new trial, the defendant appeals. Reversed and remanded.

*Mr. W. M. Johnston, and Mr. H. J. Coleman, for Appellant, submitted a brief; Mr. Johnston argued the cause orally.*

It is an elementary principle of the law that a neglect of duty, where no loss occurs, cannot give rise to a right of action. (1 Cyc. 666, 667.) The first ground upon which we seek a reversal of the judgment in this cause is based upon this elementary and undisputable principle; and in order to recover damages from the receiver, or trustee, for shrinkage in or loss of a trust fund, a loss to or of the trust fund must be shown. (*Taft v. Smith*, 186 Mass. 31, 70 N. E. 1031; 34 Cyc. 269, note 65; *In re Cornell*, 110 N. Y. 351, 18 N. E. 142.) None has been shown here.

An action on behalf of a corporation cannot be maintained by a stockholder unless the corporation or its directors have declined to bring the action, and the interests of the stockholders make it necessary that one should be instituted. A demand is a condition precedent to action (4 Thompson on Corporations, 4581; 10 Cyc. 975 *et seq.*), and when a corporation becomes insolvent and goes into the hands of a receiver, the corporate right of action passes to such receiver, and in case of an insolvent national bank, to the controller of the currency, upon whom such demand must be made before suit can

be brought by a stockholder. (See *Wallace v. Lincoln Savings Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448; *Williams v. Halliard*, 38 N. J. Eq. 373; *Ackerman v. Halsey*, 37 N. J. Eq. 356; *Jones v. Johnson*, 86 Ky. 530, 6 S. W. 582; *Bank v. Caperton*, 87 Ky. 306, 12 Am. St. Rep. 488, 8 S. W. 885; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Farwell v. Great Western Tel. Co.*, 161 Ill. 522, 44 N. E. 891; *Coble v. Beall*, 130 N. C. 533, 41 S. E. 793; *Fisher v. Andrews*, 37 Hun (N. Y.), 176; *Brinckerhoff v. Bostwick*, 23 Hun (N. Y.), 237.) In *O'Connor v. Virginia Passenger & Power Co.*, 184 N. Y. 46, 76 N. E. 1082, the court says: "In a derivative action of the character of the present one, the complaint should allege that the corporation, on being applied to, refused to prosecute and that this averment constitutes an essential element of the cause of action." To the same effect are: *Greaves v. Gouge*, 69 N. Y. 154; *Flynn v. Brooklyn City R. Co.*, 158 N. Y. 493, 53 N. E. 520; *Ide v. Bascomb*, 18 Colo. App. 415, 72 Pac. 62.

The only ground arising at the trial upon which a liability in Mr. Goodhart could be predicated is that of failing to use due care and judgment in dealing with the assets of the First National Bank of Billings. In the case of *Taft v. Smith*, *supra*, the court says: "A trustee, in making investments and in the general management of the trust, is held only to good faith and sound discretion, and is not liable for the consequences of an error in judgment, unless the error is such as to show that he acted in bad faith, or failed to exercise sound discretion." (*Wagner v. Swift's Iron etc. Works* (Ky.), 26 S. W. 720.) All the cases agree that a receiver is not bound to use any greater care, prudence or foresight than a man of ordinary care, skill and prudence would use in his own affairs and with his own property, under the same circumstances. Nor is a receiver liable for any mere error in judgment. (*Windon v. Stewart*, 43 W. Va. 711, 28 S. E. 776; *United States v. Church of Jesus Christ*, 6 Utah, 9, 21 Pac. 510; *Ripley v. McGavic*, 120 Iowa, 52, 94 N. W. 452; *Browning v. Stiles* (N. J.), 65 Atl. 457; *Appeal of Bailey* (Pa.), 5 Atl. 49; *Hamm v. Livestock Co. et al.*, 13 Tex. Civ. App. 441, 35 S. W. 427; *In re Cousins' Es-*

*tate*, 111 Cal. 441, 44 Pac. 182; *Ellig v. Naglee*, 9 Cal. 683; *Bumgardner v. Harris*, 92 Va. 188, 23 S. E. 229; *Thompson v. Brown*, 4 Johns. Ch. (N. Y.) 619.)

*Mr. O F. Goddard*, and *Mr. F. L. Tilton* submitted a brief in behalf of Respondent; *Mr. C. B. Nolan*, of counsel, argued the cause orally.

We maintain that each and every stockholder in the First National Bank of Billings, by virtue of this personal liability, had a financial interest in the collection of the assets of the bank, which interest was personal, and independent of and separate from the interest of the corporation itself. A sacrifice of any of the assets of the bank meant an equal personal and individual loss to the stockholders thereof entirely distinct from the loss to the corporation. We do not maintain that there was any right of action in the plaintiff below because of the loss to and decrease in the value of his stock in the bank. A right of action based upon this ground would unquestionably be in the corporation itself, or in the receiver thereof. (*Howe v. Barney*, 45 Fed. 668; *Hirsch v. Jones*, 56 Fed. 137; *McMullen v. Ritchie*, 64 Fed. 253.) Aside from the decrease in the value of his stock, and the loss attendant thereon, the plaintiff is under a personal liability to the amount of the par value of the stock, and that in bringing this suit he brought it for his own personal benefit. He was the owner of practically all of the stock of the corporation, and, so far as appears, every dollar more that was realized from the assets of the bank meant that much less to be paid by the plaintiff out of his own pocket. In the case of *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. Ed. 654, the court laid down the rule as follows: "Where a cause of action affects the entire interests of a corporation as such, the corporation is the proper party to sue. Where it affects especially a stockholder, he has the same right to sue *pro interesse suo* as anyone else. In the latter case it may or may not be necessary to make the corporation a party."

The rule as laid down by the courts generally in relation to the degree of care and prudence required of receivers in the

exercise of their duties is well settled. "A receiver is bound to the exercise of prudence and good faith in all his dealings with the trust estate, and to bring to the discharge of his official duties the same measure of skill and prudence, and the same personal supervision that he would give if the estate was his own." (*Heffron v. Milligan*, 40 Ill. App. 291; *State Cent. Sav. Bank v. Fanning Chain Co.*, 118 Iowa, 698; 92 N. W. 712; *Schwartz v. Keystone Oil Co.*, 153 Pa. 283, 25 Atl. 1018.) See, also, 34 Cyc. 253, where the rule is laid down as follows: "The degree of care proper to be exercised in the preservation of funds arising from the seizure of the property of a citizen requires that a receiver intrusted with such fund should be held to a rigid accountability." Testing the actions of the appellant herein by this rule, we think that a clear preponderance of the evidence supports the findings as to the lack of care and prudence on the part of the defendant Goodhart in the transaction.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On July 2, 1910, P. B. Moss was president of and principal stockholder in the First National Bank of Billings, when by order of the controller of the currency the bank was closed. Richard W. Goodhart was appointed receiver and immediately took possession of the bank's books and assets, and continued to act as such receiver until superseded by Philip Tillinghast, on October 25, 1910. When Goodhart took possession, C. D. Prather was indebted to the bank upon a promissory note for \$15,000. The indebtedness was secured, in part at least, by a chattel mortgage upon certain range horses and cattle. Prior to the maturity of the Prather note, and about September 19, 1910, a sale of the mortgaged property to R. D. Currier was effected for \$5,000, which amount was paid to the receiver and by him credited on Prather's note. After Tillinghast succeeded to the receivership, this action was commenced by Moss against Goodhart and Currier. The complaint recites the facts above more in detail, alleges that the mortgaged property was rea-

sonably worth \$11,700; that Goodhart and Currier entered into a conspiracy to force Prather to sell the property to Currier for a sum much less than the fair value; and that Goodhart, by threats and menaces, succeeded in compelling the sale, to the injury of the stockholders and creditors of the bank in the sum of \$6,700. It is further alleged that on or about November 22, 1910, the plaintiff "made demand upon the said Tillinghast, as receiver of the said bank, to bring suit against the said defendant Goodhart and the said defendant Currier to set aside said sale of said property, and for an accounting to the said trust for the value thereof, which demand was by the said Tillinghast, receiver of the said bank as aforesaid, then and there refused." The concluding paragraph of the complaint and the prayer read as follows: "This suit is brought and prosecuted in the interests of this plaintiff and of the other stockholders of said bank, as well as in the interests of all of the creditors of said bank, to the end that justice and equity may be done in the premises. Wherefore the plaintiff demands that the said sale, or pretended sale, of the said horses and cattle made by the said C. D. Prather to the said Currier be declared null and void, and that the bill of sale executed on such sale by the said C. D. Prather to the said Currier be declared null and void and of no effect, and that the defendant herein be required to account to, and pay over, to the said Philip Tillinghast, the receiver of the First National Bank of Billings, and to said trust, the said sum of \$6,700, to be by the said Tillinghast treated as other funds and assets of the said trust, and for such other and further relief as the court may find meet and agreeable to equity, and for costs of suit." To this complaint a demurrer, general and special, was interposed and overruled, and the defendants then answered, denying all the allegations of conspiracy, intimidation, or wrong conduct on the part of either of them, and alleging that the sale of the mortgaged property was made in good faith for the reasonable value thereof and for the best interests of the bank and its creditors. The affirmative allegations of the answer were put in issue by reply.

The cause was tried to the court sitting with a jury. At the close of the testimony, instructions upon the questions of law involved were settled and submitted to the jury. A general verdict in favor of the plaintiff and against the defendants for \$3,312.50, and also twelve special findings, were returned. Counsel for the defendants moved the court to adopt four of the findings as made, to reject the general verdict and the other special findings, and also to find in favor of the defendants upon some eight questions which were presented. The court denied the request, rejected the first two special findings made by the jury, adopted the others and the general verdict as against defendant Goodhart, but in favor of defendant Currier, and further found: "That the defendant Richard W. Goodhart carelessly, negligently, and wantonly failed to represent the best interests of his trust, the said plaintiff, the First National Bank of Billings and its stockholders and creditors, and sold the property described in the complaint for a sum less than its reasonable market value to the damage of the said First National Bank, its creditors, and the said P. B. Moss in the sum of \$3,312.50." The conclusion of the trial court was that the plaintiff should recover the amount of the verdict for the benefit of the bank, its receiver, creditors, and stockholders. The judgment rendered recites that: "P. B. Moss do have and recover of and from the said defendant Richard W. Goodhart the sum of \$3,312.50 together with interest thereon at the rate of 8 per cent. per annum from the date hereof until paid, and together with costs and disbursements incurred in said action, amounting to the sum of \$——." It is from that judgment and from an order denying him a new trial that defendant Goodhart appeals.

1. The errors assigned upon the instructions given and refused, and upon the rulings of the court admitting evidence, are not available to appellant. It is unnecessary for us to determine the character of this action; whether it is a suit in equity to set aside the sale of the mortgaged property, or for an accounting, or an action at law for damages. It appears [1] from the record that the cause was tried upon the theory

that it is a suit in equity, and appellant is bound by the theory he adopted in the court below. (*Cohen v. Clark*, 44 Mont. 151, 119 Pac. 775; *Galvin v. O'Gorman*, 40 Mont. 391, 106 Pac. 887; *Dempster v. Oregon Short Line Ry. Co.*, 37 Mont. 335, 96 Pac. 717.) Upon that theory no error can be predicated upon the giving or refusal to give instructions. No instructions except [2] the formal ones should be given; no general verdict should be submitted; and, if evidence be admitted which should not be, the presumption prevails that the trial court disregarded it, [3] unless it appears that it influenced the decision in some material aspect. (*Bordeaux v. Bordeaux*, 43 Mont. 102, 115 Pac. 25; *Rumping v. Rumping*, 41 Mont. 33, 108 Pac. 10; *Sanford v. Gates*, 21 Mont. 277, 53 Pac. 749.)

2. The principal controversy is over the right of plaintiff Moss to maintain this action. The plaintiff's allegation that before commencing this action he demanded of Tillinghast that he bring it and that this demand was refused is denied in the answer. There was not any proof whatever offered in support [4] of the allegation. Counsel for respondent concede the general rule to be, as heretofore stated by this court, that a stockholder cannot prosecute an action for redress for an injury to a corporation, unless it appears that a demand has been made and refused or a situation is disclosed from which it is manifest that an appeal to the corporate authorities would be useless. (*Brandt v. McIntosh*, 47 Mont. 70, 130 Pac. 413.) If the corporation is in the hands of a receiver, the demand should be made upon that officer. (*Boston & Mont. etc. Co. v. Montana Ore Pur. Co.*, 24 Mont. 142, 60 Pac. 990.) This is the rule applicable to ordinary, private corporations. If, however, the corporation which is in the hands of a receiver be a national bank, the demand and refusal are still necessary, though there is some diversity of opinion as to whether the demand should be made upon the corporation (*Bank of Bethel v. Pahquioque Bank*, 14 Wall. (U. S.) 383, 20 L. Ed. 840), or upon the receiver, or the controller of the currency. (*Brinckerhoff v. Bostwick*, 23 Hun (N. Y.), 237.) Our Code declares that every action must be prosecuted in the name of the real party in interest.



There is not any right in Moss to act for the creditors of the bank, and he can only act for the bank itself by showing that he has made demand upon the corporation (that is, upon the board of directors) or the receiver in charge, or the controller of the currency, and that his demand has been refused. (4 Thompson on Corporations, 4180, 4181; 10 Cyc. 965.) The complaint in this instance does not proceed upon the theory that demand was excused, but upon the theory that a demand was necessary and was actually made. Whenever a demand is necessary, the allegation that such demand was made and refused is an essential ingredient to the statement of a cause of action by the stockholder. (*O'Connor v. Virginia P. & P. Co.*, 184 N. Y. 46, 76 N. E. 1082; *Flynn v. Brooklyn C. R. Co.*, 158 N. Y. 493, 53 N. E. 520; *Cogswell v. Bull*, 39 Cal. 320; *Beshoar v. Chappell*, 6 Colo. App. 323, 40 Pac. 244; *Coble v. Beall*, 130 N. C. 533, 41 S. E. 793; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; 10 Cyc. 983.)

In their brief, counsel for respondent also concede that there was not "any right of action in the plaintiff below because of the loss to and decrease in the value of his stock in the bank. A right of action based upon this ground would unquestionably be in the corporation, or in the receiver thereof"; citing *Hove v. Barney* (C. C.), 45 Fed. 670; *Hirsh v. Jones* (C. C.), 56 Fed. 138; *McMullen v. Ritchie* (C. C.), 64 Fed. 262. If, then, this action is brought on behalf of the corporation or its creditors, or because of depreciation in the value of plaintiff's stock, the plaintiff, in failing to prove demand and refusal, failed to make out a case, and there is not any attempt to defend against this conclusion. It is unnecessary for us to determine upon whom the demand should be made in an action brought on behalf of the First National Bank of Billings, for, notwithstanding the complaint alleges that a demand was made upon Tillinghast, plaintiff now repudiates the idea that this is a derivative action at all. It is insisted that since plaintiff, as a stockholder of the bank, is liable for an assessment equal to the par value of his stock, under section 5151, United States Revised Statutes (U. S. Comp. Stats. 1901, p. 3465), he "had

a financial interest in the collection of the assets of the bank, which interest was personal and independent of and separate from the interest of the corporation itself. A sacrifice of any of the assets of the bank meant an equal personal and individual loss to the stockholders thereof, entirely distinct from the loss to the corporation." And again: "The plaintiff is under a personal liability to the amount of the par value of the stock, and in bringing this suit he brought it for his own personal benefit." We have taken these excerpts from the brief of respondent in an effort to state his theory of the nature of his claim. If we understand his contention aright, it is that Goodhart, while receiver, sacrificed the security held for the Prather note, with the result that \$6,700, the difference between the amount realized by Goodhart and the alleged actual value of the mortgaged property, has been lost to the funds of the bank, which sum this plaintiff, as a stockholder, will or may be required to make good, in the proportion that his stock bears to the total capital stock of the bank.

We would be reasonably certain that we have stated respondent's position correctly, but for the many changes which appear to have occurred in his theory of his case from its inception to the final submission in this court. As indicated in the quotation from his complaint above, he brought this action in the interest of himself and other stockholders and the creditors of the bank. After hearing the evidence, the trial court concluded that the recovery should be for the bank, its receivers, its creditors and stockholders, while the judgment entered was an ordinary money judgment in favor of plaintiff Moss personally. The alleged demand upon Tillinghast was to institute a suit "to set aside the sale" of the mortgaged property, and the prayer of plaintiff's complaint is that the sale "be declared null and void." If the purpose of this suit was to set aside the sale, the finding in favor of Currier, who was a party to the sale, amounted to a denial of the relief sought, while the judgment entered in favor of Moss personally takes no account of the rights of the other stockholders or the creditors of the bank. Apparently the judgment is in complete harmony with

the theory of respondent at this time, as indicated by the excerpts from his brief above, but it is without any foundation whatever in the pleadings and contradictory of the trial court's conclusion. Of course, if respondent is right now in asserting that he brought this action for his own personal benefit and for an injury which he suffered independently of the bank and its creditors, then it was not necessary to allege or prove a demand, and for the very obvious reason that it was not a matter of concern to the corporation at all. Upon this the authorities are uniform. (4 Thompson on Corporations, sec. 4590.)

If the action was brought on behalf of the bank, plaintiff has failed because he has not shown a demand and refusal, or any excuse for not making demand. If it was brought to redress a grievance peculiarly plaintiff's own or to recover for plaintiff's own benefit, then his complaint does not state a cause of action, and the general demurrer should have been sustained. The mere fact that under section 5151, United States Revised Statutes, he may be called upon to respond to an assessment upon his stock is not sufficient to give him a cause of action. He cannot anticipate that he will be injured. The bare possibility that he will be damaged is not sufficient to entitle him to a judgment. Courts cannot adjudicate with reference to events which may or may not transpire. There is not any allegation that an assessment has been or will be levied upon plaintiff's stock; neither is there any allegation that plaintiff has paid into the receiver's hands any sum whatever, or that he ever will be required or able to do so. And in passing it may be said that there is not any suggestion in the evidence either that plaintiff has paid, or been requested to pay, any assessment upon his stock. If he has not paid, he has not been injured; and, if he is never required to pay, he never will be injured.

3. Counsel for appellant also insist that the complaint fails to state a cause of action in that it fails to disclose that Prather is insolvent or that any loss will result from the sale of the mortgaged property to Currier for the price received; and this

[5] argument would be unanswerable but for the fact that without objection evidence was introduced from which it is fairly inferable that Prather was insolvent at the time of the sale, and that this mortgaged property was the only resource from which to obtain payment of his indebtedness to the bank. Under such circumstances, after judgment, this court will treat the complaint as amended to admit the proof. (*Lackman v. Simpson*, 46 Mont. 518, 129 Pac. 325; *Post v. Liberty*, 45 Mont. 1, 121 Pac. 475; *O'Brien v. Corra-Rock Island M. Co.*, 40 Mont. 212, 105 Pac. 724.)

4. Because of the uncertainty as to the theory upon which plaintiff has proceeded, we would be unable to make final disposition of this case, if there were not any other errors appearing. On the one hand, there is much evidence in the record dealing with the management of the bank which is wholly immaterial [6] upon any theory of the case, while on the other we think the trial court committed error in unduly restricting defendant in the cross-examination of plaintiff's witnesses. The issues presented related to the conspiracy alleged to exist, but which the trial court impliedly found did not exist; the fair market value of the mortgaged property; whether defendant Goodhart exercised reasonable care to ascertain the value; and whether by coercion he forced Prather to sell the property at a sacrifice. Any evidence, if otherwise competent, which would tend to throw light upon any of these issues should have been received. Courts exist to administer justice as nearly as may be, and to this end the tendency of modern practice is to liberalize the procedure in order that the very truth respecting the controversy may be disclosed. In *Knuckey v. Butte Electric Ry. Co.*, 45 Mont. 106, 122 Pac. 280, this court said: "We think the court unduly restricted the cross-examination, and again suggest the propriety of allowing the fullest scope for such examinations, to the end that the jury may be advised of all facts having a legitimate bearing upon the issues presented." And in *State v. Biggs*, 45 Mont. 400, 123 Pac. 410, these observations were made: "The right of cross-examination is a substantial one and may not be unduly restricted. It may extend, not only to facts stated by the witness in his orig-

inal examination, but to all other facts connected with them which tend to enlighten the jury upon the question in controversy. (*Kipp v. Silverman*, 25 Mont. 296, 64 Pac. 884; *Hefferlin v. Karlman*, 30 Mont. 348, 76 Pac. 757; *State v. Howard*, 30 Mont. 518, 77 Pac. 50; Rev. Codes, sec. 8021.) The rule necessarily includes questions, the purpose of which is to bring out facts illustrative of the motives, bias, and interest of the witness, or as reflecting upon his capacity and memory. The right would be of little value if inquiry into these matters were not permitted." Without stopping to consider separately each particular error predicated upon rulings of the trial court restricting defendants' counsel in their cross-examination, we think the foregoing will suffice.

The judgment and order are reversed, and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

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CONWAY, RESPONDENT, v. MONIDAH TRUST ET AL., APPELLANTS.

(No. 3,238.)

(Submitted March 21, 1913. Decided April 15, 1913.)

[132 Pac. 26.]

*Personal Injuries—Infants—Mining Claims—Unguarded Shafts—Liability of Owner—Statutes—Negligence Per Se.*

*Personal Injuries—Mining Claims—Unguarded Shafts—Infants—Contributory Negligence—Complaint.*

1. Contributory negligence may not be inferred, as a matter of law, from the acts of a child seven years old; hence the rule that plaintiff in a personal injury action, who by his complaint shows that a proximate cause of his injury was an act of his own, is barred of recovery unless he also shows that he was exercising ordinary care and circumspection at the time of the accident, has no application where the injured party was an infant of the age above mentioned.

*Same—Complaint—Sufficiency.*

2. Conceding that the rule of pleading referred to in paragraph 1, *supra*, is applicable in an action where plaintiff is a minor of the age of seven years, it was met by the allegations of plaintiff's age; that

at the time he fell into a shaft on defendant's mining claim, left unguarded (contrary to the provisions of section 8535, Revised Codes), it was dusk; that he was ignorant of the existence of the shaft, and engrossed in gathering wild flowers growing on the edge of said shaft; that he was using due care and prudence, and was without contributing fault and carelessness on his part in doing what he did.

Same—Real Property—Regulations—Police Power.

3. The owner of real property holds it subject to such reasonable control and regulation by the state, under its police power, as the legislature deems necessary for the prevention of injury to the rights of others and the security of the public health and welfare.

Same—Unguarded Mining Shafts—Statutes—Noncompliance With—Negligence *Per Se*.

4. Failure to observe the duty imposed by section 8535, Revised Codes, upon the person owning or in possession of property within the limits of a city or town or within one mile of such limits, on which there is a mining shaft, to place a cover over or a tight fence around the same, is negligence *per se*.

Same—Mining Claims—Trespass—Liability of Owner.

5. Though a plaintiff infant was a technical trespasser upon defendant's mining claim, into an unguarded shaft on which he fell, the defendant's omission to comply with the requirement imposed upon him by section 8535, *supra*, rendered him liable to damages for injuries suffered by the plaintiff.

Same—Unguarded Mining Shafts—Statutes.

6. The fact that defendant had not sunk the shaft into which plaintiff fell did not relieve him of liability, section 8535, *supra*, making it unlawful for the owner or possessor to permit "any such shaft \* \* \* to remain open or unprotected for a period of more than ten days," without regard to when or by whom it was sunk.

Same—Location of Shaft—Evidence—Insufficiency.

7. Evidence held insufficient to show that the shaft into which plaintiff fell was situated within a mile of the corporate limits of a city, a fact necessary to be shown to bring defendant within the purview of section 8535, Revised Codes.

*Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.*

ACTION by Joseph F. Conway, Jr., a minor, by Joseph F. Conway, Sr., his guardian *ad litem*, against the Monidah Trust and others. Judgment for plaintiff. Defendants appeal from the judgment and an order denying their motion for a new trial. Reversed and remanded for new trial.

Mr. James E. Murray, for Appellants, submitted a brief as well as one in reply to that of Respondent, and argued the cause orally.

The plaintiff's right to recover damages depends solely on the question whether or not defendants have been guilty of action-

able negligence. Actionable negligence is the breach of a legal duty owing to the party injured. The plaintiff must show that defendants owed him a legal duty. It is not sufficient to show that the defendants owed a duty to the state, or some third party, but the duty must be one which is owed directly to the party complaining. (Bishop on Noncontract Law, sec. 446; Kinhead on Torts, sec. 6, pp. 9, 10; *O'Leary v. Brooks Elevator Co.*, 7 N. D. 554, 41 L. R. A. 677, 75 N. W. 919; *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 1, 373; *Beinhorn v. Griswold*, 27 Mont. 79, 94 Am. St. Rep. 818, 59 L. R. A. 771, 69 Pac. 557; 1 Thompson on Negligence, sec. 3; *Bottum's Admr. etc. v. Hawks*, 84 Vt. 370, Ann. Cas. 1913A, 1025, 35 L. R. A. (n. s.) 440, 79 Atl. 858.)

The defendants' violation of the statute was not a violation of any duty owing to the plaintiff. It was a violation of a duty to the public at large, and subjected defendants to the penalties prescribed by the statute, but does not give rise to any other additional liability unknown to the common law. The courts have been quite unanimous in holding that a statute enacted for the benefit of the public at large does not create a civil liability unless expressly provided in the statute itself. (*Holwerson v. St. Louis etc. Ry. Co.*, 157 Mo. 216, 50 L. R. A. 850, 57 S. W. 770; *Moran v. Pullman Car Co.*, 134 Mo. 641, 56 Am. St. Rep. 543, 33 L. R. A. 755, 36 S. W. 659; *Riddick v. Governor*, 1 Mo. 147; *Toomey v. Southern Pac. Co.*, 86 Cal. 374, 10 L. R. A. 139, 24 Pac. 1074; *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502; *Zimmerman v. Baur*, 11 Ind. App. 607, 39 N. E. 299; *Nottage v. Sawmill Phoenix*, 133 Fed. 979; *Moore v. Gadsden*, 93 N. Y. 12; *Beehler v. Daniels*, 19 R. I. 49, 31 Atl. 582.)

Many cases may be found announcing the general doctrine that a mere violation of statute or ordinance is negligence *per se*, but upon examination it will be found that in all such cases there was a relation existing between the injured party and the violator of the statute, and the right of action existed independent of the statute, the only effect of the statute being to change the rules of evidence. (*Condran v. Chicago R. Co.*, 67 Fed. 522, 14 C. C. A. 506, 28 L. R. A. 749; *Fleming v. St. Paul etc. R. Co.*, 27 Minn. 111, 6 N. W. 448; *Illinois Central Co. v. O'Connor*, 189

Ill. 559, 59 N. E. 1098; *Loneragan v. Illinois Cent. Co.*, 87 Iowa, 755, 17 L. R. A. 254, 49 N. W. 852, 53 N. W. 236; *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536.)

"A construction giving a statute prospective operation is always to be preferred unless a purpose to give it a retrospective force is expressed by clear and positive command." (Endlich on Statutory Interpretation, secs. 271-273.) In the case at bar there is nothing to indicate that the legislature intended to give the Act in question any retroactive force; on the contrary, the statute is read as a whole, and so reading it and giving force and effect to all its language, it indicates as clearly as language can that the legislature intended to comprehend only shafts and cuts which might in the future be sunk or run. (See *Giles v. Giles*, 22 Minn. 348; *Levering v. Shockey*, 100 Ind. 558; *State v. Stein*, 13 Neb. 529, 14 N. W. 481; *State v. Bradford*, 36 Ga. 422; *Bullard v. Smith*, 28 Mont. 387, 72 Pac. 761.)

The term "any such shaft" used in the second clause of the statute refers to the shaft mentioned in the first clause, to-wit, a shaft sunk after the passage of the statute. Unless it is so construed the word "such" would have no meaning whatever, and the phrase "such shaft" should otherwise be read "any shaft," and thus the court would be reading out of the statute a word having a well-understood meaning and which was placed in the statute by the law-making body. Needless to add, courts have no such power, but must give effect to all words used, if possible. (*State v. Fisher*, 53 Or. 38, 98 Pac. 713; *Smith v. Minor*, 1 N. J. L. 16; *Walker v. Giddings*, 103 Mich. 344, 61 N. W. 512; *United States v. Taylor*, 28 Fed. Cas. No. 16,438, 1 Hughes, 514; *Moore v. Wildey Co.*, 176 Mass. 418, 57 N. E. 673; *Ogden v. Glidden*, 9 Wis. 46; *City of Philadelphia v. River Front R. Co.*, 133 Pa. 134, 19 Atl. 356; *State v. Govan*, 48 Ark. 76, 2 S. W. 347; *Warner Elevator etc. Co. v. Houston* (Tex. Civ. App.), 28 S. W. 405.)

Both the pleadings and the evidence shows that the plaintiff was guilty of contributory negligence. It was neither alleged nor proved that the plaintiff was so immature as to be incapable of contributory negligence. The mere fact that he was a minor was not sufficient to give rise to the presumption that he was in-



capable of exercising care and prudence to avoid injury. (*Gates v. Northern Pac. Ry. Co.*, 37 Mont. 103, 94 Pac. 751; *Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114, 27 L. R. A. 206, 39 N. E. 484; *Stanwood v. Clancey*, 106 Me. 72, 75 Atl. 293; 29 Cyc. 539.)

*Messrs. Breen & Jones*, for Respondent, submitted a brief and one in answer to those of Appellants, and argued the cause orally.

It is true, as contended by appellants, that this court has often declared that a land owner owes no duty to a trespasser or a mere licensee who is upon his property, save to refrain from a willful or wanton act occasioning injury and to exercise reasonable care to avoid injury after becoming aware of the presence of such a person or persons, and that a trespasser or licensee in going upon the premises of another accepts and acquiesces in the condition thereof as found upon entering. This rule of law is predicated upon the doctrine that a man can do as he wills with that which he possesses. (*Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 1, 373.) But this principle is not of unlimited and universal application—an exception is declared by statute: “The ownership of property is absolute when a single person has the absolute dominion over it and may use it or dispose of it according to his pleasure, subject only to general laws.” (Sec. 4434, Revised Codes.) And the “general laws” referred to are the laws of this state. (*Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450.) And one of the general laws of this state to which the ownership of the Tzarena Lode was subject is section 8535, Revised Codes. A criminal statute, such as section 8535—a police regulation for the health and benefit of the citizens, including children, of communities within its protection—creates a positive duty, for the nonobservance of which, resulting proximately in injury to a person within its protection, the party failing to observe the same must respond in civil damages; its violation in this state is negligence *per se*, not evidence of negligence as the rule is declared in some states (*Neary v. Northern Pac. R. Co.*, 41 Mont. 480, 110 Pac. 226), and this, even though no analogous or other duty such as is required by the terms of

the criminal statute, existed at common law; and the fact that the party injured is a trespasser or mere licensee upon the property of the violator of the law is immaterial. (*Richardson v. El Paso etc. G. Min. Co.*, 51 Colo. 440, 118 Pac. 982.) In Colorado, aside from the duties created by statutes, such as the Act referred to in the *Richardson Case* (like the one under consideration in the instant case), the general rule of law is the same as that declared by our supreme court—that is, the rule as to the degree of care owing from the land owner to a trespasser or mere licensee who finds his way upon the former's premises. (See *Watson v. Manitou & Pike's Peak Ry. Co.*, 41 Colo. 138, 17 L. R. A. (n. s.) 916, 92 Pac. 17; *Fairplay Hyd. M. Co. v. Weston*, 29 Colo. 125, 67 Pac. 160, 21 Morr. Min. Rep. 725.) The principle declared in the *Richardson Case* is a well-nigh universal one. (1 Thompson on Negligence, sec. 951; *South & North Ala. R. Co. v. Donovan*, 84 Ala. 141, 4 South. 142; *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 4 Sup. Ct. Rep. 369, 28 L. Ed. 410; *Olson v. Gill Home Inv. Co. et al.*, 58 Wash. 151, 108 Pac. 140; *Isabel v. Hannibal & St. Jo R. R. Co.*, 60 Mo. 475; *Western & A. R. R. v. Meigs*, 74 Ga. 857.)

Appellants contend that the act of the infant respondent in falling into the open shaft shows that the proximate (or a proximate) cause of his injury was his own negligent act; that because thereof it was essential that he should have negatived this apparent neglect. A recent decision of the supreme court of North Carolina is an excellent example of the courts which have adopted the view that the law in respect to criminal liability should be used as a standard in negligence actions in scaling the acts of an injured minor to determine his capacity to entertain and subject himself to the imputation of neglect; in other words, the courts adopting this rule have held that children under the age of seven are incapable of the imputation of neglect, and children between the ages of seven and twelve or seven and fourteen are *prima facie* incapable of negligent act. (*Rolin v. R. J. Reynolds Tobacco Co.*, 141 N. C. 300, 8 Ann. Cas. 638, 7 L. R. A. (n. s.) 335, 53 S. E. 891.) And the Penal Code of this state lays down the same rule in respect to criminal understanding as is

referred to in the above case, save that the age limit is extended two more years, namely, fourteen. (Sec. 8116, Rev. Codes.) And the decisions sustaining the rule announced in the *Rolin Case* are numerous. (See *Doggett v. Chicago etc. R. Co.*, 134 Iowa, 690, 13 Ann. Cas. 588, 13 L. R. A. (n. s.) 364, 112 N. W. 171; *Birmingham R. Co. v. Mattison*, 166 Ala. 602, 52 South. 49; *Tucker v. Buffalo Cotton Mills Co.*, 75 S. C. 539, 121 Am. St. Rep. 957, 57 S. E. 626; *Lynchburg etc. M. Co. v. Stanley*, 102 Va. 590, 46 S. E. 908; *Norfolk etc. R. Co. v. Higgins*, 108 Va. 324, 61 S. E. 766; *Houston etc. R. Co. v. Adams*, 44 Tex. Civ. App. 288, 98 S. W. 222.) Therefore, inasmuch as it is alleged in the complaint that the infant respondent is of tender years and of but the age of seven, as he is either conclusively or at least *prima facie* incapable of neglect, it becomes obvious that it is unnecessary that a complaint should contain the allegations referred to by appellants, essential in a suit by an adult whose complaint renders the invocation of the rule necessary. (*Avey v. Galveston etc. Ry. Co.*, 81 Tex. 243, 26 Am. St. Rep. 809, 16 S. W. 1015; *Mayor etc. v. McLain* (Miss.), 6 South. 774; 1 Thompson on Negligence, secs. 213, 214, 217.)

MR. JUSTICE SANNER delivered the opinion of the court.

So far as germane to the questions involved in this appeal, the substantial allegations of the complaint are: That the defendant, a corporation, is the owner of the Tzarena lode mining claim, situate partly within and partly without the corporate limits of the city of Butte; that on July 19, 1911, there was, and for more than a year prior thereto had been, a certain shaft, about forty-five feet deep, on this property, which the defendant had negligently permitted to remain "open, exposed and unprotected, without a substantial cover, or any cover whatever being placed over the same, or without a tight fence, or any fence whatever, being placed around the same"; that said shaft "was approximately eight feet long and four feet wide from the bottom thereof to within about five feet of the natural surface of the ground adjacent thereto, at which point the sides of the said shaft spread outwardly until the same reached the natural surface, forming

a saucer or bowl-like depression," and around the edges of this depression, and for some distance on all sides thereof, there were wild flowers blooming; that near the Tzarena lode there were also odd and curious formations of rock which, with the flowers, formed an attraction for children; "that on the said 19th day of July, 1911, the plaintiff herein, a child of the age of seven years, who did not know of the existence of said shaft, at dusk of said day was plucking wild flowers near the mouth of said shaft, and while so doing observed a cluster of wild flowers some distance from him, which he started on a run to obtain, and while so doing and using due care and prudence, and without contributing fault and carelessness on his part, ran into the mouth of said shaft aforesaid, and was precipitated to the bottom thereof," sustaining the injuries for which recovery in this action is sought.

1. This complaint is attacked as insufficient because it alleges an affirmative act of the plaintiff, to-wit, that he ran into the mouth of the shaft, as a proximate cause of his injury, and does not contain sufficient allegations to negative contributory negligence. The general rule as settled in this state by the [1] uniform course of decision is that where the complaint shows that a proximate cause of plaintiff's injury was the act of the plaintiff himself, it will be held insufficient unless it goes further and by appropriate allegations shows that the plaintiff was, at the time, exercising ordinary care and circumspection. (*Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21; *Nelson v. City of Helena*, 16 Mont. 21, 39 Pac. 905; *Hunter v. Montana C. Ry. Co.*, 22 Mont. 525, 534, 57 Pac. 140; *Cummings v. Helena & L. S. & R. Co.*, 26 Mont. 434, 68 Pac. 852; *Ball v. Gussenhoven*, 29 Mont. 321, 328, 74 Pac. 871; *Nord v. Boston & Mont. etc. Co.*, 30 Mont. 48, 75 Pac. 681; *Birsch v. Citizens' El. Co.*, 36 Mont. 574, 93 Pac. 940; *Poor v. Madison R. P. Co.*, 38 Mont. 341, 361, 99 Pac. 947; *Montague v. Hanson*, 38 Mont. 376, 99 Pac. 1063; *Badovinac v. Northern Pac. Ry. Co.*, 39 Mont. 454, 104 Pac. 543.) Of course this rule has reference only to acts of which negligence must be predicated in the absence of a countervailing explanation.

At what age a child becomes *sui juris*, so that negligence may be predicated of his acts, is a matter upon which authorities dif-

fer. By some it is held that a child of seven years of age is conclusively presumed incapable of contributory negligence. (*Watson v. Southern Ry.*, 66 S. C. 47, 44 S. E. 375; *Taylor v. Delaware & Hudson Ry.*, 113 Pa. 162, 176, 57 Am. Rep. 446, 8 Atl. 43; *Chicago etc. Ry. Co. v. Welsh*, 118 Ill. 572, 9 N. E. 197; *Indianapolis etc. Ry. v. Pitzer*, 109 Ind. 179, 194, 58 Am. Rep. 387, 6 N. E. 310, 10 N. E. 70.) However that may be, the rule in this state is that contributory negligence is not to be inferred as a matter of law, even in the case of a much older child. (*Mason v. Northern Pac. Ry. Co.*, 45 Mont. 474, 124 Pac. 271.) This being true, it follows that the rule invoked by appellant can have no application to the complaint at bar. But apart from this consideration, we think the averments of the age of the [2] plaintiff; the fact that it was dusk; his ignorance of the existence of the shaft; the natural engrossment in his childish pursuit; and the general allegation that he was "using due care, and prudence and without contributing fault and carelessness on his part"—are, as a matter of pleading, sufficient to negative contributory negligence and to avoid the rule. (*Birsch v. Citizens' El. Co.*, *supra*; *Poor v. Madison R. P. Co.*, *supra*; *Evansville & T. H. Ry. v. Crist*, 116 Ind. 446, 9 Am. St. Rep. 865, 2 L. R. A. 450, 19 N. E. 310; 1 Thompson on Negligence, secs. 375, 377, 378.)

2. Under the allegations of the complaint, the respondent was technically a mere trespasser upon the property of the appellant. (*Egan v. Montana C. Ry. Co.*, 24 Mont. 569, 63 Pac. 831; *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 1, 373.) It is the undoubted rule at common law that the owner of real property owes no duty to trespassers, other than to refrain from intentional injury. Hence no right of action would arise, in the absence of statute, in favor of a trespasser who might suffer injury under the circumstances here pleaded (*Driscoll v. Clark*, *supra*); but every owner holds his property subject to reasonable control and [3] regulation of the mode of keeping and use as the legislature, under the police power vested in the state, may think necessary for the prevention of injury to the rights of others and

the security of the public health and welfare. (*Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450.)

The question, then, is whether or not a trespasser upon private property may recover damages for injury suffered by him while so trespassing, because of the property owner's failure to comply with section 8535, Revised Codes. This section is found in Title X of Part I of the Penal Code, under the heading, "Crimes Against the Public Health and Safety," and, so far as pertinent to this case, reads as follows: "Every person who sinks any shaft \* \* \* or causes the same to be done, within the limits of any city or town or village in this state, or within one mile of the corporate limits of any city or town \* \* \* and who shall fail to place a substantial cover over or tight fence around the same, is punishable by a fine not exceeding one thousand dollars. The owner of any property \* \* \* shall be deemed to be within the provisions of this Act if he permit any such shaft \* \* \* to remain open, exposed or unprotected upon his property \* \* \* for a period of more than ten days. \* \* \*"

The contention is that this is a mere penal statute, providing its own express sanction, and, in the absence of appropriate language, gives rise to no civil responsibility whatever. In answer [4] to this we remark that there is by this statute imposed a duty positive and absolute, where none existed before; and it is the well-settled rule that failure to observe such a duty is negligence *per se*. (*Osterholm v. Boston & Mont. etc. Co.*, 40 Mont. 508, 107 Pac. 499; *Neary v. Northern Pac. Ry. Co.*, 41 Mont. 480, 110 Pac. 226; *Melville v. Butte-Balaklava C. Co.*, 47 Mont. 1, 130 Pac. 441, 9 L. R. A. (n. s.) 339, note.) In the *Melville Case*, decided at the last term of this court, we said: "It is the general rule that, where a statute makes a requirement, or prohibits a thing, for the benefit of a person or class of persons, one injured by reason of a violation of it is entitled to maintain an action against him by whose disobedience he has suffered injury; and this is true whether the statute is penal or not." To this declaration we still adhere as in accord with the express provisions of our Code. A failure to perform an act imposed by law as an absolute duty is an unlawful omission (section 5051, Rev.

Codes); and any person suffering detriment by reason of it may recover damages (section 6040, Rev. Codes).

But it is urged that this principle cannot apply in favor of one not within the purview of the statute by which the duty is imposed, and to this we assent; so that the remaining inquiry is:

[5] Does the duty imposed by section 8535 apply for the benefit of persons who may by chance be technical trespassers upon mining property? This question, both directly and in its analogies, has been before many courts with apparent diversity of result; but no real difficulty is encountered in extracting a consistent rule out of the apparent conflict of decision, when it is observed that the various statutes involved are interpreted according to substantially this classification: (a) Those imposing duties to or for the benefit of the municipality or to the public considered as an entity. From such statutes no private right of action arises. (*Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502; *Taylor v. L. S. & M. S. Ry.*, 45 Mich. 74, 40 Am. Rep. 457, 7 N. W. 728; *Frontier Laundry Co. v. Connolly*, 72 Neb. 767, 68 L. R. A. 425, 101 N. W. 995.) (b) Those imposing duties to persons of a particular class. To have a right of action from such a statute one must clearly belong to the contemplated class. (*Osterholm v. Boston & Mont. etc. Co.*, *supra*; *Toomey v. Southern Pac. R. R. Co.*, 86 Cal. 374, 10 L. R. A. 139, 24 Pac. 1074; *Flanagan v. Sanders*, 138 Mich. 253, 101 N. W. 581.) (c) Those imposing duties to the public, considered as a composite of individuals, in which case a right of action does arise in one of the public when, and only when, he has sustained some special injury by reason of noncompliance. (*Hayes v. Michigan C. R. Co.*, 111 U. S. 228, 239, 240, 4 Sup. Ct. Rep. 369, 28 L. Ed. 410; *Philadelphia W. & B. Ry. v. Stebbing*, 62 Md. 504, 516, 517; *Sluder v. St. Louis Transit Co.*, 189 Mo. 107, 5 L. R. A. (n. s.) 186, 187, 88 S. W. 648; *Union Pac. Ry. v. McDonald*, 152 U. S. 262, 282, 14 Sup. Ct. Rep. 619, 38 L. Ed. 434.) It may be said, and perhaps correctly, that these are essentially restatements of the same thing, looked at from different angles (note, 9 L. R. A. (n. s.) 343); but that is unimportant. The important thing is that there are statutes such as we have mentioned under (c), and

these statutes usually bear the aspect of police regulations for the protection of the public relative to matters with which the public contact is commonly through individuals, and as to which the individuals are entitled to assume that the law has been observed. (*South & North Ala. R. Co. v. Donovan*, 84 Ala. 141, 4 South. 142; *Jackson v. Kansas C. etc. Ry.*, 157 Mo. 621, 80 Am. St. Rep. 650, 58 S. W. 32.) In a case relied on by the appellants (*Frontier Laundry Co. v. Connolly*, *supra*) the existence and meaning of such statutes is clearly recognized, as follows: "Wherever a statute or ordinance creates a duty or obligation, though it does not in express terms give a remedy, the remedy which is properly applicable to that obligation follows as an incident; but whether a liability arising from the breach of a duty prescribed by a statute or ordinance accrues for the benefit of an individual specially injured thereby, or whether such liability is exclusively of a public character, must depend upon the nature of the duty enjoined, and the benefits to be derived from its performance." The duty enjoined by section 8535 is such that noncompliance affects the public commonly through the person or property of the individual. The benefits to be derived from its performance inure to the public through the added safety assured to individual person and property, and can affect the public in no other way. That the failure to observe the requirements of such a statute will, if the proximate cause of injury, support an action even by a trespasser is sustained by an abundance of authority. (*Richardson v. El Paso, C. G. etc. Co.*, 51 Colo. 440, 118 Pac. 982; *Erb v. Morasch*, 8 Kan. App. 61, 54 Pac. 323; *Alabama & Va. R. Co. v. Carter*, 77 Miss. 511, 27 South. 993; *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb. 90, 56 N. W. 796, 57 N. W. 522; *Keyser v. Chicago & Grand Trunk Ry.*, 66 Mich. 390, 33 N. W. 867; *Meeks v. Southern Pac. R. R. Co.*, 56 Cal. 513, 38 Am. Rep. 67; *South & North Ala. Ry. v. Donovan*, *supra*; *Hayes v. M. C. R. Co.*, *supra*; *Jackson v. Kansas C. etc. Ry. Co.*, *supra*.)

In further elucidation of our views of this phase of the present case we quote the language of the supreme court of Colorado from the *Richardson Case*, *supra*: "An open, unprotected shaft



is a menace to life and limb. In the night-time or in a storm persons may fall into it, or children may thoughtlessly approach too near the edge and be precipitated to the bottom. Reasonable provisions, requiring an abandoned shaft to be so protected as to prevent such casualties, come clearly within the police powers of the commonwealth. \* \* \* It is contended that plaintiffs, as well as the deceased, were mere licensees, which did not entitle either of them to the use of the dump in the immediate vicinity of the shaft, which was about 110 feet from the house; that deceased was therefore a trespasser when upon the dump and at the shaft, or, if the license extended to the immediate vicinity of the shaft, \* \* \* the defendant violated none of its obligations growing out of the relationship of owner to licensee or trespasser. The proposition is wholly inapplicable. Plaintiffs' action is not based upon the ground of a failure on the part of defendant to fulfill any obligation which it owed them or the deceased because they occupied a house on the Australia claim, but upon the failure of the defendant to comply with a statutory requirement, the purpose of which was to protect the public from injury, which neglect, they claim, caused the death of their son. \* \* \* To prevent injury to the public, including children, the General Assembly has required abandoned shafts to be covered. This, as we have said, is a valid police regulation, and the failure of the defendant to perform the duty imposed by statute renders it liable in this case if the death of the boy, in a substantial sense, was caused by its failure to comply with the statute."

3. It is contended by appellants that this case is not within the provisions of section 8535 of the Penal Code, because it was [6] not shown that the Monidah Trust sank the shaft. The answer is found in the second portion of the section, viz.: "The owner \* \* \* shall be deemed to be within the provisions of this Act if he permit any such shaft \* \* \* to remain open, exposed or unprotected upon his property \* \* \* for a period of more than ten days." But it is urged that the words "any such shaft" restrict the application of the Act to shafts sunk after its passage. We cannot assent to this. As stated

above, the section is a police regulation, and its plain meaning is that no person shall be allowed to have an unprotected shaft, either inside a city, town, or village, or outside of, and within a mile of, the corporate limits of a city or town, and this without regard to when or by whom it may have been sunk. Those who, when the section was enacted found themselves in possession of unprotected shafts so situated were given ten days' time to cover or inclose them; those who since the section was enacted, as the result of city or town extension, find themselves similarly possessed are given a like time for the same purpose. The phrase "any such shaft" is descriptive of the nature and kind of shaft (*State v. Gemmell*, 45 Mont. 210, 122 Pac. 268), and means an unprotected shaft that is situated as mentioned in the first part of the section. No other construction is possible in view of the history of the statute and its obvious purpose (*Richardson v. El Paso Min. Co.*, *supra*).

4. An issue was made in the pleadings as to whether the shaft in question was, at the time of the accident, within a mile of the corporate limits of Butte. One of the grounds of [7] appellants' motion for nonsuit was as follows: "Sixth. For the reason that the plaintiff has wholly failed to show that the defendants' mining claim, the Tzarena mining claim, or the shaft thereon rather, was within \* \* \* a mile of the corporate limits of the city of Butte, and for the reason that the plaintiff has wholly failed to establish the corporate limits of the city of Butte." We think the motion should have been granted on this ground. The only testimony bearing upon the proximity of the shaft to the city limits is that of McMahon, and nowhere does he say what the fact was at the time of the accident. He testifies entirely as of the date of trial, except that in one unresponsive answer he speaks as of the date of his survey, which was after the accident. Moreover, while in his direct examination he says, "I know where the boundaries of the city is near what is known as the Tzarena lode claim, No. 1092, and know the city limits in that vicinity," on his cross-examination he nullifies this statement and the value of the map he had made by the following declaration: "I got my information as to the

corporate limits of the city of Butte from ordinance No. 642 on file in the office of the city clerk." Respondent asserts that it was not wrong, but praiseworthy, in the surveyor to secure the data for the running of his line from the city ordinance. That is not the point, and that is not what the witness said. Had there been proof by common reputation, as provided in subdivision 11 of section 7887, Revised Codes, or by other means not dependent upon ordinance 642, of the general location of the boundaries, there would then have been no harm in the fact that the surveyor, purposing to make a plat for use in evidence, consulted an ordinance to secure his detail data; but we are given to understand by the statement of McMahon that what he knew about the matter was derived from the ordinance, and he gives no other source. The ordinance itself was introduced in evidence, and it is to be noted that instead of aiding the testimony of McMahon as a source of absolute information, it shows upon its face that it did not, and could not without further proceedings, fix the boundaries as described. To meet this respondent bears strongly upon the statement of the witness that ordinance No. 642 "went into effect" and "became operative" during the Corby administration, some four or five years before the trial; but this was a mere incidental expression of opinion by a person not shown to be qualified, upon a subject not susceptible of opinion evidence. An attempt is made to show that appellants supplied this deficiency through their witness Hobart, also a civil engineer, who said: "I examined the mining claim known as the Tzarena mining claim situated in the southwest of the city, and also examined the shaft over there which now has a fence around it." This statement, besides being ambiguous and apropos to a mere general location, does not pretend to advise us concerning the proximity of the shaft to the corporate limits of Butte, and it will not support the inference sought to be drawn from it.

5. Since this case must be reversed, it is unnecessary to enlarge upon the other assignments of alleged error. Suffice it to say that we see no fault in the other rulings complained of, as they are presented by this record.

The discussion contained in the first part of this opinion settles adversely to appellants the contention that the evidence establishes contributory negligence as a matter of law. We are not prepared to say that, even if plaintiff had been an adult, the evidence would have shown contributory negligence so as to take the case from the jury; and certainly it did not do so as to this infant plaintiff. So, too, we think the evidence was sufficient to establish the damages with as much certainty as is requisite in this class of cases. As to whether it justified the amount awarded by the jury, we express no opinion.

Because of respondent's failure to submit sufficient proof that the shaft into which he fell was, at the time of the accident, within one mile of the corporate limits of the city of Butte as alleged, the judgment and order appealed from are reversed, and the cause is remanded for a new trial.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

Rehearing denied May 17, 1913.

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STATE EX REL. SCOLLARD, RELATOR, v. DISTRICT COURT  
ET AL., RESPONDENTS.

(No. 3,322.)

(Submitted April 21, 1913. Decided May 1, 1913.)

[132 Pac. 21.]

*Prohibition—Premature Application—Refusal of Writ.*

1. Writ of prohibition to restrain a district court from assuming jurisdiction of a proceeding arising out of a suit for divorce, alleged to have been erroneously transferred to it on change of venue, will not issue where relator has failed to exhaust his remedies in said court before applying to the supreme court for relief.

Original application for writ of prohibition by the state, on relation of Bartholomew A. Scollard, against the district court of the second judicial district, in and for Silver Bow County, and one of its judges. Proceeding dismissed.

*Messrs. Geo. Y. Patten, and H. M. Stewart, for Relator; Mr. Patten argued the cause orally.*

*Messrs. Nolan & Donovan, and Mr. W. W. Goodman, for Respondents; Mr. L. P. Donovan argued the cause orally.*

MR. JUSTICE SANNER delivered the opinion of the court.

Application for writ of prohibition. Basis: that the respondent court, claiming to have before it, by virtue of a change of venue from Gallatin county, a certain divorce action by the relator, as plaintiff, against Alice B. Scollard, as defendant, has issued and caused to be served upon the relator an order commanding him to appear before said court and show cause why he should not be required to pay alimony, suit money, and attorney's fees, which order the said court, unless prevented, will proceed to hear and determine. It is alleged that the said court is without jurisdiction in the premises, because the files and papers in said cause have never been transmitted to said court, and because the order of the district court of Gallatin county, granting the change of venue, was stayed, and pending such stay the said action was on motion of plaintiff dismissed before the filing, on the part of the defendant, of any plea seeking affirmative relief.

We decline discussion at this time of any of the questions presented, but deny the application of relator for the reasons stated by this court in *State ex rel. Mackel v. District Court*, 44 Mont. [1] 178, 179, 119 Pac. 476, as follows: "He should first present his contention \* \* \* to the district court. That court has given him an opportunity to show cause, and he must avail himself of it. The presumption is that the court will correctly decide the point." If the relator's contention be correct and the court should so decide, he will not be aggrieved; "on the other

hand, if the order below is adverse to him, \* \* \* he may invoke the power of this court to afford relief therefrom." (See, also, *State ex rel. Browne v. Booher*, 43 Mont. 569, 118 Pac. 271; *State ex rel. Heinze v. District Court*, 32 Mont. 394, 80 Pac. 673.)

The proceedings are dismissed.

*Dismissed.*

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE HOLLOWAY did not hear the argument and takes no part in the foregoing decision.

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SIMONICH, RESPONDENT, v. QUILICI, APPELLANT.

(No. 3,243.)

(Submitted April 15, 1913. Decided May 1, 1913.)

[132 Pac. 21.]

*Personal Injuries—Negligence—Evidence—Sufficiency.*

1. Evidence held sufficient to warrant a finding that defendant carelessly and negligently, for the purpose of frustrating a hold-up in his saloon, fired a shotgun into a room where plaintiff was standing and seriously injured him.

*Appeal from District Court, Silver Bow County; John B. McClernan, Judge.*

ACTION by Martin Simonich against Dominick Quilici. Judgment for plaintiff, and defendant appeals from it and an order denying him a new trial. Affirmed.

Mr. J. L. Wines, and Mr. T. J. Harrington, for Appellant, submitted a brief; Mr. Wines argued the cause orally.

Mr. Alex. Mackel, for Respondent, submitted a brief and argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Appeals by the defendant from a judgment and an order denying his motion for a new trial. Plaintiff brought this action to recover damages for a personal injury suffered by him through the alleged negligence of the defendant. The injury was inflicted under these circumstances:

One Donati and defendant were conducting a saloon in [1] Meaderville, in Silver Bow county. On the evening of July 31, 1911, the defendant was in charge of the business, Donati being absent. Several persons were present, most of whom were in a room in the rear of the building engaged in gambling. Among these was plaintiff. Defendant was running a roulette wheel. The barroom extends east and west, and fronts to the east; the bar being on the north side. The rear room is reached by a door opening from the barroom. At the west end of the bar a door opens into another room toward the north. From this room a second door opens into the rear room, and a third to the outside toward the west. On the north side of the rear room is a window. One going toward the west from the outside door of the room at the end of the bar may look through the window and observe what is passing within the rear room. While the games were in progress, three men entered the room through a door opening from the rear to rob the players. They commanded all persons present to hold up their hands and face the walls. This they all did, except the defendant, who escaped into the north room. The plaintiff was standing against the west wall. While the robbers were engaged in gathering money from the tables at which games had been in progress, some one on the outside fired a charge from a shotgun through the north window, which struck plaintiff in the abdomen, inflicting a serious wound.

The substance of the charge in the complaint is that the defendant fired the shot with the purpose of preventing the robbery, but that he did it carelessly and negligently, thereby injuring plaintiff. The defendant in his answer denied that he fired the shot. Whether he did or not was the one issue made

in the evidence in the district court; it being apparently conceded that defendant's liability or nonliability depended entirely upon the determination of this issue. Whether the conclusion of the jury is based upon substantial evidence is the only question submitted to us for decision.

The evidence is somewhat voluminous. No useful purpose would be served by a detailed statement of it. A careful reading and analysis of it as a whole, however, produces the conviction that the jury could not reasonably have found otherwise than they did. It is true that the shot was fired through the north window from the darkness outside, and that no one definitely identified the defendant as the person who fired it. Yet it is not disputed that he was in the room north of the bar, immediately before and after the shot came through the window, in possession of a shotgun—the only one on the premises; it being kept there for just such an emergency as arose on the evening in question. These circumstances were supplemented by others, which cannot be explained on any other reasonable theory than that defendant fired the shot.

The judgment and order are affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.



## COOK-REYNOLDS CO., RESPONDENT, v. CHIPMAN, APPELLANT.

(No. 3,240.)

(Submitted March 22, 1913. Decided May 2, 1913.)

[133 Pac. 694.]

*Real Property—Sales—Breach of Contract—Advance Payments—Forfeiture—Equity—Cancellation—Rescission—Interest—Special Damages—Pleading.***Contracts of Sale—Breach by Buyer—Advance Payments—Forfeiture.**

1. In the absence of an equitable showing, a defaulting purchaser of property is not entitled to a return of any advance payments made by him, even though there is no provision in the contract of sale for liquidated damages in case of default.

**Same—Time of Essence of Contract—Applicability of Principle.**

2. Whether time is or is not of the essence of a contract of sale is material to the application of the rule stated in paragraph 1, *supra*, only where the defaulting party has, after expiration of the time limit, made a tender, with a refusal of acceptance by the seller; hence where no such tender was made but the buyer expressly pleaded his inability to meet his obligations, the question of time became immaterial.

**Same—Forfeitures—Statute—Applicability.**

3. Where, under a contract of sale of property (real and personal), cancellation of which, with forfeiture of an advance payment, was sought because of breach by the vendee in failing to make a deferred payment, the legal title remained in the vendor though possession was delivered to the vendee, section 5800, Revised Codes, providing for a vendor's lien, has no application, and therefore the provision of section 5715, declaring void, "contracts for the forfeiture of property subject to a lien," etc., held not to have any pertinency.

**Same—Rescission—Cancellation—Placing Defendant in *Statu Quo*—Inapplicability of Principle.**

4. Held, that the rule requiring the vendor who comes into a court of equity seeking the rescission of a contract of sale, to return to the vendee all moneys paid on the purchase price in excess of an amount sufficient to compensate plaintiff in damages, has no necessary application in an action upon the contract to cancel it for a breach by the vendee.

**Same—Forfeiture—Relief from—Evidence.**

5. Evidence held to show that defendant vendee's breach of duty, under a contract of sale of land and personality, in failing to meet a deferred payment on the due date was not so grossly negligent, willful or fraudulent, as to deny him relief under section 6039, Revised Codes, from forfeiture of an advance payment of \$5,000 as provided in the contract, where it appeared that the value of the property had not diminished during defendant's occupancy, that the value of its use was much less than the advance payment made by him, and that damages by way of compensation could easily be arrived at.

Same—Forfeiture—Erroneous Decree—Interest.

6. A cause of action to recover unpaid interest on a note (with attorney's fees for collecting same), the principal of which was erroneously decreed forfeited to plaintiff, falls with the forfeiture.

Same—Special Damages—Pleading.

7. Special damages due to defendant's withholding property sought to be regained by the seller because of breach of contract by the former, not having been specially pleaded, were improperly awarded.

*Appeal from the District Court, Fergus County; E. K. Cheadle, Judge.*

ACTION by the Cook-Reynolds Company against L. H. Chipman. Judgment for plaintiff. Defendant appeals from the judgment and an order denying his motion for a new trial. Reversed and remanded.

*Mr. Edward C. Russell, and Mr. J. C. Huntoon, for Appellant, submitted a brief; Mr. Russell argued the cause orally.*

The contract in question here was practically an executed one, with certain conditions subsequent, as to payments on the balance of the purchase price and is so regarded in equity. The vendee is regarded as the owner of the equitable title, while the vendor holds the legal title in trust for the purchaser and has a lien for the purchase price. (Boone on Real Property, 3372; *Bodley v. Ferguson*, 30 Cal. 511; *Miles v. Hemenway*, 59 Or. 318, 111 Pac. 696, 117 Pac. 273; *Collins v. Creason*, 55 Or. 524, 106 Pac. 445.) Keeping these facts in mind, we will seek to apply the statutes and the reasoning of decided cases to the case at bar.

The freedom of contract is limited by the law as it stands at the date of execution (Rev. Codes, sec. 5054), which is read into the contract and controls or overrides its provisions. Allegations must be made and proof offered by a plaintiff seeking to bring his case within the exception of section 5055. (*Deuninck v. West Gallatin Irr. Co.*, 28 Mont. 255, 262, 72 Pac. 618.) No such allegations or proof were made in this case. Under section 5054 the provision of the contract as to forfeited payments as liquidated damages was void. (*Deuninck v. West Gallatin Irr. Co.*, *supra*; *Long Beach v. Dodge*, 135 Cal. 401, 67 Pac.

499; *Drew v. Pedlar*, 87 Cal. 442, 22 Am. St. Rep. 257, 25 Pac. 749; *Phelps v. Brown*, 95 Cal. 572, 30 Pac. 774; *Easton v. Cressey*, 100 Cal. 75, 34 Pac. 622.) Forfeiture as liquidated damages would then be error. Forfeitures are not looked upon with favor by our legislatures or by the courts. Section 4906 reads: "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." (*Reclamation Dist. v. Sels*, 145 Cal. 181, 78 Pac. 638; *Washburn on Real Property*, 447.)

Furthermore, under sections 5800 and 5715, a forfeiture under the circumstances here presented is forbidden, for if the parties do not mutually abandon or rescind the contract, the vendor can foreclose his vendor's lien for the money due and thus close out the equity of the purchaser in the land. Having this lien, he is prohibited from forcing a condition, providing for a forfeiture of the buyer's interest in the land, which the latter's payments have purchased. It is further seen that this foreclosure of the interest of the buyer must be subject to redemption by him, and that a decree cutting off any and all equity of redemption is against the spirit of the statute. In Oregon, without such a statute, this is held to be the only course in equity. (*Miles v. Hemenway*, 59 Or. 318, 111 Pac. 696, 117 Pac. 273; *Sievers v. Brown*, 34 Or. 454, 45 L. R. A. 642, 56 Pac. 171.)

The district court should have relieved appellant under section 6039. The appellant, by returning the real and personal property and offering full payment for the use of the property, certainly offered full compensation in accordance with the terms of this section. While it does not declare the forfeiture clause of the contract void, as do sections 5054 and 5715, it sets forth the rule of equity, to which the appellant appealed in his answer. If it be held, however, that the forfeiture clause, despite the statutes, was originally in effect, the respondent waived it by the frequent extensions of the payment due February 1, 1911. (*Graham v. Merchant*, 43 Or. 294, 72 Pac. 1088; *Eby v. Larkin*, 53 Wash. 454, 102 Pac. 236; *King v. Seebeck*, 20 Idaho, 223, 118 Pac. 292.) The return of the purchase money to a vendee in default was ordered in *Jackson v. McGinness*, 14

Pa. 331, and *State v. Hackley*, 124 La. 854, 50 South. 772. The respondent, by its action having elected to rescind, the court should have compelled it to do equity, as requested by appellant, and in not doing so erred.

Moreover, it should have decreed a period of redemption, such being provided for in section 5715 and by the rules of equity. (*Keller v. Lewis*, 53 Cal. 113; *Fairchild v. Mullan*, 90 Cal. 190, 27 Pac. 201; *Miles v. Hemenway*, 59 Or. 318, 111 Pac. 696, 117 Pac. 273; *Higginbotham v. Frock*, 48 Or. 129, 120 Am. St. Rep. 796, 83 Pac. 536.) The failure of respondent to redeliver appellant's note at the time of his demand for possession waived his right of forfeiture. (*Miles v. Hemenway*, *supra*; *Comstock v. Brosseau*, 65 Ill. 39.)

*Messrs. Belden & De Kalb* submitted a brief in behalf of Respondent; *Mr. O. W. Belden* argued the cause orally.

There are only three instances known to the law where the right of a vendee to the return of any part of the purchase money is recognized: 1. Where the vendor refuses to comply with his contract to convey. 2. Where the vendor cannot convey such title as he agreed to convey. 3. Where there has been a mutual rescission of the contract. (*Glock v. Howard & Wilson Col. Co.*, 123 Cal. 1, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713.)

Sections 5054 and 5715 of the Revised Codes have no application whatever to a case of this kind. This is not a foreclosure suit, nor is the property involved subject to any lien. (*Avery v. Clark*, 87 Cal. 619, 22 Am. St. Rep. 272, 25 Pac. 919.) It is recognized everywhere that when a vendee defaults in payments or fails to comply with the conditions of an executory contract, he thereby loses, not necessarily as damages, or necessarily as a forfeiture, as the term is understood, but in any event loses, the moneys he may have paid to the vendor. (2 Sutherland on Damages, 3d ed., sec. 585; *Bradford v. Parkhurst*, 96 Cal. 102, 31 Am. St. Rep. 189, 30 Pac. 1106; *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320; *Garberino v. Roberts*, 109 Cal. 125, 41 Pac. 857; *Patterson v. Murphy*, 41 Neb. 818, 60 N. W. 1; *White-*

*man v. Perkins*, 56 Neb. 181, 76 N. W. 547; *Estes v. Browning*, 11 Tex. 237, 60 Am. Dec. 238; *Southern Pac. Ry. Co. v. Allen*, 112 Cal. 455, 44 Pac. 796; *Stratton v. California Land etc. Co.*, 86 Cal. 353, 24 Pac. 1065; *Rayfield v. Van Meter*, 120 Cal. 416, 52 Pac. 666; *Hansbrough v. Peck*, 5 Wall. (U. S.) 497, 18 L. Ed. 520.) The rule is not a rule of damages, and in its application does not result in a forfeiture in the sense in which that term is recognized in law, but is the inevitable result of a failure to comply with the terms of a contract solemnly entered into. It is immaterial to the right of respondent to retain the moneys paid that any portion of the alleged forfeiture clause be contained in the contract.

Section 5800, Revised Codes, is a section applying to executed contracts, and there is no such thing known as a vendor's lien where the contract is executory as in this case. California has the same code section (sec. 3046, Cal. Civ. Code), and the court there has frequently construed the section as not applying to cases of this kind. (*Avery v. Clark*, 87 Cal. 619, 22 Am. St. Rep. 272, 25 Pac. 919; *Kent v. Williams*, 114 Cal. 537, 46 Pac. 462; *Longmaid v. Coulter*, 123 Cal. 208, 55 Pac. 791.) Consequently the provisions of section 5715 do not apply to the case at bar. What is said about the vendor having the right to foreclose a vendor's lien in appellant's brief is, therefore, incorrect; nor is there any such thing in the state of Montana as a period of redemption in cases like this such as exists in Oregon and which is said to be sustained by the Oregon cases cited.

Appellant contends that should the forfeiture clause be effective, the respondent was estopped from enforcing it by the assurance alleged to have been given the appellant. But relief against a forfeiture will not be granted on the ground that several extensions of time have been made, and that improvements have been made on the strength of a waiver of the strict terms of the contract, where the conditions on which the extensions were granted had not been performed, and no tender of the sum in default. (See *Boulder etc. Placer Co. v. Maxwell*, 24 Colo. 87, 48 Pac. 815; *Hansbrough v. Peck*, *supra*.)

The commencing of an action is not an election to rescind. (*Aikman v. Sanborn*, 5 Cal. Unrep. 961, 52 Pac. 729; *Southern Pacific Ry. Co. v. Allen*, 112 Cal. 455, 44 Pac. 796.)

MR. JUSTICE SANNER delivered the opinion of the court.

On June 17, 1910, the parties to this action entered into a written agreement for the sale by respondent—plaintiff below—and the purchase by appellant—defendant below—of certain real and personal property situate in Fergus county, Montana. The purchase price as fixed by the agreement was \$29,605, payable, with interest, as follows: \$5,000 at the execution of the contract; \$5,819 on or before February 1, 1911; \$9,786 on or before December 1, 1911; \$1,000 on or before December 1, 1912; \$1,000 on or before December 1, 1913; and \$7,000 on or before December 1, 1914. It was further provided in the agreement that the purchaser should pay all taxes thereafter accruing; that when the purchaser should make the payment of \$9,786 due December 1, 1911, he should be entitled to a warranty deed of the lands, giving back to the seller a mortgage or mortgages to secure the balance of the unpaid purchase price; that "in case of the failure of the said purchaser to make either of the payments or interest thereon, or any part thereof, or to perform any of the covenants on his part hereby made and entered into, then the whole of said payments and interest shall become immediately due and payable and this contract shall, at the option of the seller, be forfeited and determined, \* \* \* and the said purchaser shall forfeit all payments made by him on this contract, and all his right, title and interest in all buildings, fences or other improvements whatsoever, and such payments and improvements shall be retained by the said seller in full satisfaction and in liquidation of all damages by them sustained, and they shall have the right to re-enter and take possession of the premises aforesaid, and the purchaser shall redeliver to the seller the personal property hereinbefore enumerated, or the value thereof."

The amended complaint is in two causes of action. The first cause of action alleges that defendant defaulted in the payment

due February 1, 1911; that plaintiff after such default made demand upon defendant for the surrender of the property, both real and personal, which was refused; that plaintiff is the owner and entitled to the immediate possession of all said property; and that it is unlawfully withheld, to plaintiff's damage in the sum of \$5,000. The plaintiff's theory of its rights is set forth in the following allegation: "That by reason of the acts complained of on the part of the defendant, and defendant's failure to keep and perform the said contract, a copy of which is hereto attached, at the time and in the manner therein specified, under and by virtue of the terms thereof, defendant has abandoned and forfeited all his right under said contract, together with the right of possession of said premises in said contract described, and to the right of the possession of the personal property therein enumerated, which plaintiff has demanded of defendant that he quit and surrender up to this plaintiff."

The second cause of action is for interest, and attorneys' fees for collecting the same, upon a promissory note for \$3,000 given as part of the first payment, the principal having been paid.

The prayer contains no specific demand for damages, but asks, among other things: "That the said contract be declared to be ended and determined, and all rights of the said defendant L. H. Chipman thereunder, together with all payments made thereon, be forfeited according to the terms of said contract," and "that plaintiff have such other and further relief in the premises as \* \* \* may seem meet and agreeable to equity."

The answer admits default in the payment due February 1, 1911; denies that the plaintiff is the owner or entitled to the immediate possession of the property, or that he, the defendant, unlawfully withholds the same, or that plaintiff is damaged by such withholding, or that plaintiff ever made demand for possession of the same prior to the commencement of the action, and alleges that he, the defendant, made an offer to restore the property to the plaintiff upon the condition that the plaintiff return to him the \$5,000 paid down on the contract, "less a reasonable amount to be allowed to the plaintiff for the use of said property, for the time defendant was in possession thereof," which

offer the plaintiff ignored; that he, defendant, has an equity in said real estate, and is the owner of said personal property, and is entitled to withhold possession of both until the sum of \$5,000 paid down by him is returned, with interest "less a reasonable sum for the use of such property from the 17th day of June, 1910, until the same is restored to the possession of plaintiff." By way of affirmative defense an estoppel is attempted, and there is also a counterclaim pleaded for the return of the first payment of \$5,000, with interest, and for the return of \$143.58 taxes paid, with interest, less a reasonable sum for the use of the property. The defendant's prayer is specific, but concludes with a demand for such other relief as may be just and equitable.

The findings and conclusions of law by the trial court were in favor of the plaintiff, and judgment was entered accordingly. In the judgment was included an award of "\$870 damages incurred by the plaintiff by reason of the refusal of defendant to deliver possession of said premises and property on the 11th day of July, 1911," and a decree that all right, claim and interest of the defendant in and to the property involved "is ended and determined, and all payments made thereon are adjudged and decreed to be forfeited to the plaintiff."

The principal contention is that the trial court erred in decreeing the defendant's payments forfeited, and in decreeing the return of the property involved "without imposing the condition that the plaintiff return to the defendant the payments made by him, less a reasonable rental for the use of the property and any damages suffered by the plaintiff by reason of the breach of contract." As we understand the argument of appellant, it is: that the provision of the contract above quoted, being a stipulation for liquidated damages, is void; that time was not of the essence of the contract, hence there was no basis for a forfeiture; that a forfeiture was precluded because the property was subject to a vendor's lien; that the appellant was entitled to be relieved from the forfeiture of his payments in view of his offer to make full compensation; that the respondent was estopped by its conduct in the premises from claiming a forfeiture; that this suit is based upon an election of respondent



to rescind, and having appealed to equity to vindicate its action, equity forbids that it retain more of appellant's payments than will suffice to recoup its damage.

1. Whether the provision of the contract above quoted is [1] a stipulation for liquidated damages, and whether, as such, it is within the inhibition of section 5054, Revised Codes, we need not inquire. Even if it be so, this fact would not of itself require that in every, or in any, case the defaulting purchaser should have a return of the moneys paid by him; on the contrary, its effect is to leave the parties where they would be if no such stipulation had been made (*Bennett Bros. Co. v. Tam*, 24 Mont. 457, 468, 62 Pac. 780; *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 69 Am. St. Rep. 17, 43 L. R. A. 139, 55 Pac. 713; *List v. Moore* (Cal. App.) 129 Pac. 962; *Edgerton v. Peckham*, 11 Paige Ch. (N. Y.) 352); and it is settled that without such a stipulation the defaulting purchaser is not, in the absence of an equitable showing, entitled to a return of any part of the moneys paid. (*Perkins v. Allnut*, 47 Mont. 13, 130 Pac. 1; *Clifton v. Willson*, *post*, p. 305, 132 Pac. 424; *Hansbrough v. Peck*, 5 Wall. (U. S.) 497, 18 L. Ed. 520; *List v. Moore*, *supra*; *Glock v. Howard & Wilson Colony Co.*, *supra*.)

2. But it is urged that neither the principle last stated, nor the stipulation itself could be a proper basis of the court's decision [2] because time was not expressly made as of the essence of the contract. Whether time is or is not of the essence of the contract is material to the application of the above rule only where there has been a tender or offer of performance by the party in apparent default, with a refusal of acceptance by the other. Here the appellant not only has made no such tender or offer, but expressly pleads his inability to perform. The situation thus presented is in effect the same as though time had been expressly made as of the essence of the contract.

3. Nor can we sustain the contention that forfeiture was precluded in this case because of the following provisions of the [3] Revised Codes: "All contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption

from a lien, are void" (sec. 5715); and: "One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured, otherwise than by the personal obligation of the buyer." (Sec. 5800.) Neither section is pertinent. By the argument the application of section 5715 is made to depend upon the existence of a vendor's lien under section 5800. We think that section does not apply where the legal title is retained by the vendor. As an expression of our views we quote from Professor Pomeroy as follows: "It has been said, in English and American decisions, that the vendor's lien may arise before conveyance as well as after; and the interest or right of the vendor under an ordinary contract for the sale of land \* \* \* has been called a vendor's lien, and treated in the same manner as the equitable lien arising in favor of the grantor upon an actual conveyance of the land where the purchase price in whole or in part is left unpaid. This is an unnecessary and an incorrect use of terms; it confounds legal notions which are essentially different. There is a plain distinction between the lien of the grantor after a conveyance, and the interest of the vendor before conveyance. The former is not a legal estate, but is a mere equitable charge on the land. \* \* \* In the latter, although possession may have been delivered to the vendee, and \* \* \* the vendee may have acquired an equitable estate, yet the vendor retains the legal title, and the vendee cannot prejudice that legal title, or do anything by which it shall be divested, except \* \* \* by paying the price according to the terms of the contract. To call this complete legal title a lien is certainly a misnomer. In case of a conveyance, the grantor has a lien, but no title. In case of a contract for sale before conveyance, the vendor has the legal title, and has no need of any lien." (3 Pomeroy's Equity Jurisprudence, sec. 1260.) Where it appears that the intention of the parties was in fact to create the relationship of mortgagor and mortgagee, title being retained with the idea it should operate as a mortgage, there might indeed be occasion to apply the provision of section 5715, but that position is not, and could not well be, taken here, because the contract will be a

no such construction (*Arnold v. Fraser*, 43 Mont. 540, 117 Pac. 1064), and because it is not the forfeiture of the property to which a vendor's lien might, under proper circumstances, attach that is complained of, but the forfeiture of the money paid thereon. Of course, if there is no lien within the meaning of section 5800, there can be no basis for denying a forfeiture upon this ground or for complaint because a period of redemption was not provided in the decree.

4. In the brief of appellant we find a vigorous discussion of the proposition that since the respondent "has come into a [4] court of equity asking its aid to rescind the contract," equity commands the return to appellant of all of the purchase money paid in excess of an amount sufficient to compensate the respondent in damages. Granting the premise, the conclusion is inevitable; but although the suit is in equity it is not an action to rescind or to judicially vindicate a rescission. The respondent is standing upon the contract seeking a cancellation of it because of appellant's breach. It is quite true that in *Arnold v. Fraser*, *supra*, an action similar to this was tried on the theory that the vendor should have returned or offered to return the purchase money paid, less the value of the use of the property, and that that case was affirmed on appeal; but in the opinion the correctness of this theory was questioned, it being expressly stated that this court would determine the case as made without dissent by anyone in the court below, reserving the question itself for future treatment. We are now convinced that that case was, and the present case is, of the character referred to in *Clark v. American D. & M. Co.*, 28 Mont. 468, 476, 72 Pac. 978, wherein it is said: "There is a wide difference between the rescission of a contract and its mere termination or cancellation. 'It is well settled that a technical rescission of the contract has the legal effect of entitling each of the parties to be restored to the condition in which he was before the contract was made, so far as that is possible, and that no rights accrue to either by force of the terms of the contract. But, besides technical rescission, there is a mode of abandoning a contract as a live and enforceable obligation which still entitles the party declaring its abandonment

to look to the contract to determine the compensation he may be entitled to under its terms for the breach which gave him the right of abandonment.' (*Hayes v. City of Nashville*, 80 Fed. 641, 26 C. C. A. 59.) 'Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about.' (*Anvil Min. Co. v. Humble*, 135 U. S. 540, 14 Sup. Ct. Rep. 876, 38 L. Ed. 814, 18 Morr. Min. Rep. 98.)" The consequence of this is that the rule of equity invoked by appellant has no necessary application to an action upon the contract to cancel it for a breach, and that in such an action the remedies afforded by the contract will be enforced unless they impinge upon other rules of equity or law.

5. This brings us to the consideration of the question of appellant's rights under the affirmative pleas of the answer and in virtue of the provisions of section 6039, Revised Codes. That [5] section provides: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful or fraudulent breach of duty." There is some contention by respondent to the effect that this statute is not intended to apply to a case of this nature; but if it does not, we are at a loss to understand where it might better apply. If, as a matter of fact, the actual damages sustained by the vendor in this case are less in amount than the moneys paid by the purchaser, and if, under the principles above stated, the vendor can retain the excess, then most assuredly the purchaser will have incurred a loss in the nature of a forfeiture authorized by the terms of the contract, by reason of his failure to comply with the same. From such a loss he may be relieved upon a showing that he is equitably entitled to such relief, if his breach of duty was not grossly negligent, willful or fraudulent. As mentioned above, the appellant made an affirmative plea by way of estoppel which, whether defective as such or not, must, under the prayer for general relief, be noticed as a statement

in part of his equities in the matter. From this and other portions of his answer it is made to appear that immediately after making the contract the appellant became fearful that he would not be able to comply strictly with its terms, and was reassured and encouraged by the respondent's officers to the effect that he would not suffer damage at its hands if he would continue and endeavor to comply with its terms; that, relying on such assurances, he did in good faith endeavor to comply with the terms of the contract, and in doing so expended large sums of money and gave more than a year of his time and labor in attempting to carry out its terms and would be damaged to the amount of many thousands of dollars by the enforcement of the strict terms of the forfeiture; that respondent by its officers frequently waived the strict performance of the contract as to terms of payment, extending the time of the payment due February 1, 1911; and that on July 11, 1911, the appellant, finding himself unable to meet the payments, submitted the proposition to return the property as hereinabove referred to; that the property can be returned undiminished in value; that the value of its use is \$500, and that appellant stands willing to have the property returned and to have full compensation made to respondent for the use of the property and for any damages sustained by respondent on account of his breach of the contract.

The evidence touching some of these allegations is conflicting, and, of course, the findings of the court as to them may not be disturbed; but as to others it is undisputed. For instance: the appellant testified to three distinct conversations with Mr. Reynolds, the president of the company, all before the payment of the \$3,000 note which was given as part of the first payment. Concerning the first conversation held about August 8, 1910, the appellant says: "We came down and told him we saw we were not able to go through with the payments, couldn't sell our ranch in the east, times had tightened up so, and we wished they would take it back, and he said: 'Mr. Chipman, you go out there and show good intentions; we will see you through with this. We will see that you don't lose any money.' " This conversation was in the presence of appellant's son who cor-

roborates his father concerning it. About a week after this, the second conversation occurred, as follows: "I came down then in about a week again, after some stuff, and I went in and I says: 'I wish you would take this ranch back.' And he said: 'Well, now, don't be faint-hearted. You go out there and we will see that you don't lose anything.' I says, 'Do you think you could sell this ranch?' and he says, 'Why, yes, I think we could.' So I listed it with them for sale." The appellant's wife, being dissatisfied, went with him to the respondent's office, still in August, 1910, and there found Mr. Reynolds, and the third conversation occurred in her presence, which she renders as follows: "We visited Mr. Reynolds in reference to going out on the place; we were a little afraid we would not be able to make the payments and he wanted to know what we wanted to do, and I told him—he asked me what I wanted to do—he wanted to know if we wanted to go out in September and try it. I told him we would if we would be able to make the payments. 'Well,' he said, 'we have never foreclosed on anyone yet, and we won't begin on you people.'" There is not in the record any semblance of contradiction of this testimony; and the finding of the jury that no such assurances were given is without any foundation whatever. After these conversations the appellant went on the land and paid the note, and concerning that matter he says: "If Mr. Reynolds had not made us these promises we would have throwed it up right then when we had \$2,000 paid on it"; instead of that he estimates his detriment by going ahead at \$8,000. The appellant also testified that he had tried to sell his Iowa land to raise the money for the payments but was unable to do so, and he sought to show in detail and as evidence of his good faith, the particular efforts he had made to meet the terms of the contract, but in this he was checked by the trial court.

We think the evidence as a whole shows that the appellant's breach of duty was not grossly negligent, willful or fraudulent, and that it was entirely practical and not difficult to ascertain the damages of respondent on principles of compensation in accordance with the provisions of the statute. In these circum-

stances, appellant was in position to ask relief from the forfeiture of his payments in excess of respondent's damage, and that relief should in this case have been granted to him because of the conduct of respondent toward him and its effect upon him as detailed above. We subjoin a few authorities which lend support to these views: *Barnes v. Clement*, 12 S. D. 270, 81 N. W. 301; *Cue v. Johnson*, 73 Kan. 558, 85 Pac. 598; *Parsons v. Smilie*, 97 Cal. 647, 32 Pac. 702; *Sherburne v. Hirst*, 121 Fed. 998; *Boulder & Beaver Placer Co. v. Maxwell*, 24 Colo. 87, 92, 48 Pac. 815; 1 Pomeroy's Equity Jurisprudence, secs. 432-460; 16 Cyc. 79, sec. 6, p. 80, sec. C.

6. If, as we have held, the appellant should have been [6] relieved from the forfeiture of his payments in excess of respondent's damages, it necessarily follows that the findings and judgment relative to the second cause of action cannot be upheld. Seeking, as it did, the unpaid interest (with attorney's fees for collecting the same) of the \$3,000 note given as part of the first payment, the principal of which was paid, it was a mere incident to the main transaction, and upon the case presented, it necessarily falls with the forfeiture.

7. In addition to the forfeiture of all appellant's payments without regard to the amount of respondent's damage, the judgment also awards the respondent the sum of \$870 damages for [7] withholding the property after demand. Counsel for respondent addressing the trial court, stated his position concerning this matter to be that, had appellant surrendered possession after the breach, respondent would be entitled only to the payments made as liquidated damages for the breach, "but we claim that under the law and under the contract we are entitled to an additional damage by reason of having to maintain this action for the purpose of getting possession after the breach." This is a clear claim for special damages of a particular character, which, if recoverable in this sort of action at all, must be supported by specific allegations in the pleadings (*Gordon v. Northern Pacific Ry. Co.*, 39 Mont. 571, 18 Ann. Cas. 583, 104 Pac. 679; *O'Brien v. Quinn*, 35 Mont. 441, 90 Pac. 166; *Root v. Butte, A. & P. Ry. Co.*, 20 Mont. 354, 51 Pac. 155),

and no such allegations appear. Moreover, the evidence does not show any special damage due to withholding the property after demand. The jury found that the value of the real estate had not been diminished, and that the value of the use for the whole period from June 17, 1910, to the date of trial was \$2,610; this being much less than the appellant's payments, there was no basis in fact for the award of \$870 over and above the forfeiture, and the judgment must be disaffirmed as to that.

8. It was possible for the trial court to adjust the equities of the parties as presented at the time of the trial, and this court should do likewise, so far as it can, to the end that the litigation may have a speedy close. Rejecting, then, the items of \$870, damage for withholding after demand; rejecting also the allowance for interest and attorneys' fees upon the second cause of action, and taking into account the moneys paid by appellant, with interest at the legal rate since such payment, on the one hand, and on the other, \$2,610, the value of the use of the property, and \$362.45, damage from personal property depreciated or not returned, we determine the difference in appellant's favor to have been \$2,706.40; and this amount the judgment should have provided that appellant recover from respondent. The appellant, however, was entitled to this only as a relief from forfeiture. Having defaulted, he was in no position to refuse possession; hence the respondent is entitled to the value of the use of the property up to the time of restoration. As we are not informed whether respondent has taken possession, we do not know what, if any, allowance should be made for the use of the property since the date of trial. We are therefore unable to make final adjustment of these equities, but must remand the cause for further proceedings.

The judgment and order appealed from are reversed and the cause is remanded to the district court of Fergus county with directions to find what, if any, further allowance should be made to respondent for the use of the property in question since the date of the trial of this cause, and to deduct the amount so found from the above balance of \$2,706.40, after adding thereto interest at the legal rate since the date of trial,



and thereupon to enter its judgment and decree canceling the contract in question, awarding possession of the property to respondent and providing that appellant have and recover from the respondent the sum ascertained to be due after taking the proceedings aforesaid.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
CONCUR.

Rehearing denied June 28, 1913.

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CLIFTON, RESPONDENT, v. WILLSON, APPELLANT.

(No. 3,179.)

(Submitted April 14, 1913. Decided May 3, 1913.)

[132 Pac. 424.]

*Sales—Personal Property—Breach of Contract—Advance Payments—Forfeitures—Relief from—Prerequisites—Instructions—Invasion of Province of Jury—Nominal Damages—Nonsuit.*

*Sales—Personal Property—Breach of Contract—Nominal Damages—Nonsuit—Error.*

1. Where defendant in an action for the breach of a contract of sale of livestock might, under conflicting evidence, have been entitled to at least nominal damages on a counterclaim interposed by him, it was error to direct a nonsuit as to such counterclaim.

*Same—Advance Payments—Forfeitures—Recovery Back—Prerequisites.*

2. One who, after making advance payments on a contract of sale of personalty, refuses to complete the transaction, the seller being ready and willing to fulfill its stipulations, cannot recover them back, unless he can bring himself within the exception provided by section 6039, Revised Codes, by alleging and proving facts and circumstances upon which, in equity and good conscience, he should have relief from the forfeiture, and which excuse him from the imputation of gross negligence, or willful or fraudulent breach of duty.

*Same—Liquidated Damages—Pleading and Proof.*

3. Under section 5054, Revised Codes, every contract which provides for liquidated damages on a breach thereof, is *prima facie* void as to such stipulation; therefore, a party seeking recovery upon the contract must allege and prove that it falls within the exception provided in section 5055.

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Same—Instructions—Invasion of Province of Jury.

4. Where the evidence was in conflict as to which of the parties to a contract of sale of livestock, for the breach of which plaintiff sought recovery in an action in which defendant interposed a counterclaim, was in default, the court erred in charging the jury in effect that defendant was.

Same—Refusal to Accept Delivery—Resale—Effect on Advance Payments.

5. After the buyer of livestock had refused to accept delivery of the animals and renounced the contract of sale, he was not in a position to insist that the seller was bound to refrain from reselling them at the peril of incurring the obligation to refund advance payments made by him under the contract.

*Appeal from District Court, Custer County; Sydney Sanner, Judge.*

ACTION by Ben Clifton against Preston H. Willson. Judgment for plaintiff, and defendant appeals from it and from an order denying him a new trial. Reversed and remanded.

*Mr. George W. Farr*, for Appellant, submitted a brief and argued the cause orally.

For Respondent, there was a brief by *Messrs. Hathhorn & Brown*, and *Messrs. Loud & Campbell*, and oral argument by *Mr. William Donald Campbell*.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Plaintiff brought this action to recover damages for an alleged breach by the defendant of the following contract:

"This is to certify that Preston H. Willson of Miles City, Montana, have this 12th day of April, 1909, bargained and sold to Ben Clifton of Billings, Montana, the following described livestock, and do hereby guarantee the title thereto, and that the said Ben Clifton of Billings, Montana, does hereby agree to purchase the said livestock at the price agreed upon: From 3,000 to 3,200 of ewes, ages as follows, about 200 head of yearling ewes, 1909, at \$4.15 per head; about 1,700 head of two (2) year old ewes, 1909 ages at \$4.15 per head; balance three (3) and four (4) years old about equal number of ages, 1909 ages at \$4.15 per head. Said ewes to be delivered at Ismay

or Terry, Montana, October first at buyer's option. And that said Preston H. Willson of Miles City, Montana, does hereby guarantee said livestock to be all in good merchantable condition at the time of delivery and to pass the government inspection. The receipt of part payment is admitted as follows, to-wit, \$800 down and \$800 to be paid at the First National Bank of Miles City, Montana, July 1, 1909, or said payment is forfeited and this contract is null and void. The balance of the purchase price is to be paid on the delivery of the above sheep.

“[Signed] PRESTON H. WILLSON.

“BEN CLIFTON.

“By R. E. GEUWELL.

“Witness: W. J. DUNNIGAN.”

It is alleged in the complaint, in substance, that the plaintiff performed all the conditions of the contract to be by him performed; that prior to the date fixed therein for the delivery of the ewes he notified the defendant that he would accept delivery at Terry; that the defendant refused to deliver them at Terry; that the plaintiff thereupon notified defendant that he would accept delivery at Ismay; that plaintiff was ready and willing at the time fixed to receive the ewes at Ismay, and that he offered to pay the balance of the purchase price; that defendant failed and refused to deliver them there or elsewhere, to the plaintiff's damage in the sum of \$4,446. In his answer defendant denied any breach of the contract on his part. He then alleged that about three weeks prior to October 1, 1909, it was agreed between him and the plaintiff that delivery of the ewes should be made at Ismay, and that on that date the ewes were at that place ready for delivery; that plaintiff refused to accept them, though defendant then and there offered to deliver them; that it was thereupon agreed that the plaintiff would accept delivery on October 3 or 4; that defendant was then ready to deliver them; that plaintiff refused to accept them; that, because he was required to keep them in close herd, defendant suffered a loss of 225 head of the value of \$1,500; that he lost much time and was put to great expense in driving the ewes to Ismay and holding them ready for de-

livery, whereby he suffered additional damage to the amount of \$1,500. He demanded judgment for \$3,000. There was issue by reply.

At the trial it was conceded by plaintiff that it was agreed that delivery could be made at Ismay and that defendant was ready at that place for delivery of a sufficient number of ewes to meet the requirements of the contract. It was conceded also that the plaintiff, through his agent, R. E. Gruwell, whom he sent to Ismay to receive the ewes, refused to accept them because in his opinion they were not of the character specified in the contract. The controversy in the evidence at the trial, therefore, was entirely with reference to the questions whether or not the ewes offered to the plaintiff at Ismay were such as were specified in the contract, and what amount of damage had been suffered by plaintiff. At the close of the evidence the court ordered a nonsuit as to the defendant's counterclaim, upon the ground that upon any theory of the case the evidence failed to show that he had been damaged in any amount. The jury returned a verdict in favor of plaintiff for \$2,600, with interest on \$1,600 from October 3, 1909, and judgment was entered accordingly. The defendant has appealed from the judgment and from an order denying his motion for a new trial.

1. Counsel contend that the court erred in directing a nonsuit as to defendant's counterclaim. We think it did. It was [1] a question for the jury, upon conflicting evidence, whether the defendant had failed to tender for delivery ewes such as the contract required and thus breached it, or whether he had fully discharged his obligation by the tender he made. A determination of this controversy in defendant's favor would have entitled him to a verdict for nominal damages, even though there had been no showing by his evidence of substantial loss by plaintiff's refusal to accept. (*Raiche v. Morrison*, 47 Mont. 127, 130 Pac. 1074; 13 Cyc. 17; Sedgwick on Damages, 8th ed., secs. 96, 97.) It appears that within a few days after plaintiff had refused to accept delivery, and while the ewes were still held with other sheep at Ismay, the defendant sold the entire herd to one Hammond at the price specified in the contract.

There was no evidence tending to show any item of special damage. Nevertheless the court should, under a proper charge, have left it to the jury to find a verdict for the defendant in nominal damages in case they found that plaintiff had been guilty of a breach of the contract. Inasmuch as the jury found that defendant was in default, had the trial been free from error in other particulars, we should regard the order directing a nonsuit as error without prejudice. Since, however, the defendant is entitled to a new trial because of error in the instructions, we have deemed it necessary to state our views with reference to this feature of the case.

2. These remarks dispose of the contention that the evidence is insufficient to justify the verdict. It presents a case upon conflicting evidence as to who was in default.

3. The court submitted to the jury these instructions: (2) "The defendant in this action having failed to present sufficient competent evidence to sustain his claim for damages alleged to have been suffered by him, you are instructed that the plaintiff is entitled to have returned to him the moneys paid in part performance of the contract in question, to wit, the sum of \$1,600, together with interest thereon at the rate of eight per cent per annum from October 3, 1909, and this irrespective of whom you may find to have been at fault in the failure to carry out the contract in question." (15) " \* \* \* In this case your verdict must be for the plaintiff, but you must find and determine from the evidence to what amount he is entitled under the evidence and these instructions and insert such amount, not exceeding \$4,150, in your verdict."

In another part of the charge the jury were told that the plaintiff was not entitled to recover any amount over and above the \$1,600 advance payments, with interest, unless they also found that the defendant had failed to tender delivery of ewes of the character specified in the contract; but that if they did so find they should award, as additional damages, such an amount as would be equal to the excess of the value of the property to the plaintiff over the contract price. The theory adopted by the court seems to have been this: That under the

various provisions of the Revised Codes, damages are in all [2] cases to be measured by the standard of compensation for the detriment suffered (Rev. Codes, secs. 6038, 6040, 6041, 6048, 6086); that save in exceptional cases a stipulation in a contract of a sum to be paid as liquidated damages as compensation for a breach is void and cannot be enforced (secs. 5054, 5055); and that it must therefore follow that under the provision found in section 6039, since defendant had failed to show that he had suffered substantial detriment, he was not entitled to further consideration, and plaintiff must be allowed to recover the amount of the advance payments. In other words, if he were not permitted to recover, he would be denied the relief to which he is entitled under section 6039. We think this theory erroneous. Section 6039 declares: "Whenever, by the terms of an obligation a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful or fraudulent breach of duty." By its terms it applies to those cases in which a plaintiff has incurred a forfeiture of payments already made or of the value of some act done in part performance of the contract, by a breach in failing fully to perform, and is seeking relief therefrom. It is based upon the principle that he who seeks equity must do, or offer to do, equity; and to obtain relief he must by his allegations and proof bring himself within its purview.

At the common law, one who was guilty of a breach of his contract by stopping short of full performance could not recover payments made prior to the breach, for the obvious reason that it is the policy of the law to compel parties to live up to their agreements and not encourage them in their violation. This rule is recognized by all the courts, so far as we are aware. (*Perkins v. Allnut*, 47 Mont. 13, 130 Pac. 1, and cases cited.) We cite also the following cases: *Neis v. O'Brien*, 12 Wash. 358, 50 Am. St. Rep. 894, 41 Pac. 59; *Witherow v. Witherow*, 16 Ohio, 238; *Rayfield v. Van Meter*, 120 Cal. 416, 52 Pac. 666; *Haynes v. Hart*, 42 Barb. (N. Y.) 58; *Walter v. Reed*, 34 Neb.

544, 52 N. W. 682; *Leonard v. Morgan*, 6 Gray (Mass.), 412; *Jones v. Marsh*, 22 Vt. 144; *Stevens v. Brown*, 60 Iowa, 403, 14 N. W. 735; *Colvin v. Weedman*, 50 Ill. 311; *Eddy & Bissell L. S. Co. v. Blackburn*, 70 Fed. 949, 17 C. C. A. 532; *Hapgood v. Shaw*, 105 Mass. 276; *Hansbrough v. Peck*, 5 Wall. (U. S.) 497, 18 L. Ed. 520. In this latter case it was said: "No rule in respect to the contract is better settled than this: That the party who has advanced money, or done an act in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done." In such cases the adverse party was entitled to retain advance payments or the benefit of an act done in part performance, whether the contract, as here, provided for a forfeiture or not. (*Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713; *Tiedeman on Sales*, sec. 129.) Manifestly, therefore, the purpose of the section is to provide a remedy by which the party in default may have relief, if he can allege and prove facts and circumstances upon which, in equity and good conscience, he should have relief from the consequences of his own default, and which also excuse him from the imputation of gross negligence, or willful or fraudulent breach of duty.

This view of the provision is consonant with the theory of compensation embodied in sections 6038, 6040, 6041, 6048, and 6068, and also 5054 and 5055, which prohibit parties to contracts from stipulating therein for liquidated damages to be paid for a breach thereof which may occur, save in the exceptional cases mentioned. Under these provisions, the courts, in adjusting the rights of parties after a breach has occurred, may not permit recovery in any case of a greater or less sum than will compensate the injured party for the detriment suffered by him. By way of supplement to them and in recognition of the rule of compensation established by them, the legislature enacted section 6039, not to abrogate but to modify the rule

as stated in the cases cited *supra*, to the end that a party in default who would otherwise suffer total loss of all advance payments made or of the value of a thing done in part performance of his contract may, in proper cases, recover something notwithstanding he is in default. This must be so, otherwise its presence in the Code cannot be accounted for. Since the language [3] of section 5054 is general, every contract containing a stipulation such as is denounced therein is *prima facie* void as to the stipulation. Therefore, when recovery is sought upon it, the plaintiff's allegations and proof must bring it within the exception provided in section 5055. (*Deuninck v. West Gallatin I. Co.*, 28 Mont. 255, 72 Pac. 618; *Long Beach City School Dist. v. Dodge*, 135 Cal. 401, 67 Pac. 499.) The same rule is applicable when relief is sought under section 6039. *Prima facie*, one who has violated a contract is not entitled to any relief. If he seeks it, he must put himself within the exception created by the statute; that is, within its equity. Any other rule would enable him to make out a *prima facie* case by a bald allegation that he has partly performed his agreement, that he has determined not to proceed further toward its final conclusion, and that he desires to be relieved from the consequent forfeiture which the law has declared. Adopting the language of the court in *Witherow v. Witherow*, *supra*: "The establishment of such a principle would have a tendency to encourage the violation of contracts—to diminish in the minds of contracting parties a sense of the obligation which rests upon them to perform their agreements. Any principle which would have such an effect ought not to be recognized as sound law. It is the duty of courts to enforce the performance of contracts, not to encourage their violation." The case of *Rayfield v. Van Meter*, *supra*, is on principle directly in point in support of our view, the section of the statute of California, cited (Cal. Civ. Code, sec. 3275) as authority for the conclusion stated, being identical with section 6039, *supra*.

The statute has no application to a case where, as in this case, the plaintiff seeks to recover damages for a breach by the defendant. While he is seeking to recover his advance payments



as a part of the compensation due him, the plaintiff assumes to stand strictly upon his legal rights—risking his chance of ultimate recovery exclusively upon his alleged ability to show that his loss has been due to defendant's failure to deliver the ewes according to his agreement. For these reasons we think defendant entitled to a new trial.

Counsel for plaintiff argue that, even so, the defendant was not prejudiced because the jury found that he failed to tender delivery of ewes of the character stipulated for in the contract. Instruction 15, however, in effect withdrew from the jury [4] entirely the question whether the plaintiff or defendant was in default. It assumed that defendant was and left it to the jury to determine only the amount of damages plaintiff should recover, if any, in addition to the amount of the advance payments; whereas the evidence as to who was in default was conflicting. It was the province of the jury to find on this question and to return a verdict for the defendant if they found that he had made tender of delivery in conformity with the terms of the contract.

Nor is plaintiff in any better position because, after he peremptorily refused to accept delivery, defendant sold the ewes at the contract price to Hammond. Defendant was not bound [5] to hold them indefinitely. The plaintiff refused to accept them and renounced the contract. He could not thereafter claim that defendant was bound to keep them for his benefit at the peril of incurring the obligation to refund the advance payments. If this were so, the result would be that plaintiff by his own wrong could compel the defendant to retain the property which his necessities might require him to sell. This would be unreasonable, and cannot be justified on any principle of law. (*Ketchum v. Evertson*, 13 Johns. (N. Y.) 359, 7 Am. Dec. 384; *Rayfield v. Van Meter*, *supra*; *Neis v. O'Brien*, *supra*; *McKinney v. Harvie*, 38 Minn. 18, 8 Am. St. Rep. 640, 35 N. W. 668.)

4. The correctness of several rulings made by the court in the admission and exclusion of evidence is drawn in question. We do not find material error in any of them.

The judgment and order are reversed, and the cause is remanded for a new trial.

*Reversed and remanded.*

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE SANNER, being disqualified, did not hear the argument and takes no part in the foregoing decision.

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KALLIO, APPELLANT, v. NORTHWESTERN IMPROVEMENT CO. ET AL., RESPONDENTS.

(No. 3,249.)

(Submitted April 16, 1913. Decided May 3, 1913.)

[132 Pac. 419.]

*Master and Servant—Personal Injuries—Coal Mines—Statutes—Construction—Safe Place—Duties of Employer and Employee—"Working Place"—Parties in Pari Delicto—Evidence—Custom—Inadmissibility.*

Personal Injuries—Coal Mines—Safe Place.

1. The rule that the master must exercise ordinary care and diligence to provide his employees with a reasonably safe place in which to work, though not applying where they are creating the place of work, when it is constantly being changed in character by their work, or when it only becomes dangerous by their carelessness or negligence, does obtain where the place is a completed one, such as that part of a mine tunnel lying behind the miner driving it, and is applicable to coal mines as well as to any other place of employment.

Same—"Working Place"—Coal Mine Act—Construction.

2. The "working place" which a coal miner must, under section 83 of the Coal Mine Act (Laws 1911, Chap. 120), examine before commencing to work and keep safe, is any place where he may be directed to work, and not merely the face of the entry or that portion of the walls or roof thereof which might be shaken by blasting.

Same—Duty of Inspection—Upon Whom.

3. Under the Coal Mine Act (Laws 1911, Chap. 120), it is the duty of both employer and employee to look after the safety of the place where mining is being done; and the fact that at a given time one of such places may not be the seat of active operations, and therefore subject to the exclusive inspection of the operator, does not absolve the miner from the duty of examining it when he is about to work there.

Same—Parties in *Pari Delicto*—Effect on Right to Recover.

4. Where neither defendant coal mine operator nor plaintiff, one of his employees, observed the statutory duty of inspection imposed upon them by the Coal Mine Act, the parties were in *pari delicto*, and plaintiff was therefore in no position to recover damages for an accident due to such nonobservance.

Same—Rule in Derogation of Act—Evidence—Inadmissibility.

5. Held, that the provisions of Chapter 120, Laws of 1911, designed to bring about a lessening of the hazards of coal mining, could not be nullified by any private agreement between employer and employee, or any rule or custom in derogation of the duties imposed by the Act; and therefore evidence of a rule that the miners employed by defendant were to examine and keep safe the entry in which they were working, for a certain distance from the face, the defendant to do the same beyond that point, was properly excluded.

*Appeal from District Court, Carbon County; Sydney Fox, Judge.*

ACTION by Oscar Kallio against the Northwestern Improvement Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Messrs. Walsh & Nolan, and Mr. Albert A. Callow, for Appellant, submitted a brief; Mr. C. B. Nolan argued the cause orally.

The common-law rule requires the master to exercise reasonable care in providing for the servant a reasonably safe place, and requires the master to exercise reasonable care in the way of inspection to see that the place is kept reasonably safe. (*Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673.) While the servant in the present instance assumed the risk of dangers which were open and obvious, he was not required, and was under no obligation, to make tests by sounding the walls of the entry to ascertain whether any portion of them, on account of air-slacking, were loose and likely to fall. (*Schroder v. Montana Iron Works*, 38 Mont. 474, 100 Pac. 619; *Thurman v. Pittsburg & Montana C. Co.*, 41 Mont. 141, 108 Pac. 588; *Allen v. Bear Creek Coal Co.*, *supra*.) If, however, in the operations carried on changes in the place were effected as the work was done so as to bring into existence dangers arising from the constantly changing conditions, as to such dangers the servant assumed the risk as an incident of his employment. (*Shaw v.*

*New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515.) If, however, the place was a completed one, not affected by the work carried on, then to such a place the duty of the master attached, and as to such a place the duty of reasonable care and inspection applied. (*Kelley v. Fourth of July Min. Co.*, 16 Mont. 484, 41 Pac. 273.)

We presume, however, that the ruling of the court was based on the assumption that the common-law rules above referred to were abrogated by the statute which the Twelfth Legislative Assembly passed, regulating coal mining operations. In most of the states where the cases have arisen, to which we will make reference, statutes were enacted as comprehensive as ours and practically along the same lines, and the courts held that the rules of the common law were not abrogated. (*Consolidated Coal Co. v. Bokamp*, 181 Ill. 9, 54 N. E. 567.)

The statute in question, in providing that the miners should see that the working place was reasonably safe, did not define what the working place was. Presumably the working place to which the statute referred was the working place respecting which the rules of the common law required the servant should take care of.

The supreme court of Oklahoma in the case of *Welty v. United States*, 14 Okl. 7, 76 Pac. 121, quoted with approval from the case of *Axhelm v. United States*, 9 Okl. 321, 60 Pac. 98, as follows: "It is an elementary rule, in construing a statute containing words which have a fixed meaning at common law, and the statute nowhere defines such words, that they will be given the same meaning they have at the common law, and, so far as we have been able to find, there are no exceptions to this rule." In the case of *Stag Canyon Fuel Co. v. Rose* (Tex. Civ. App.), 145 S. W. 677, as in the case at bar, the workman was required to examine his working place. Nevertheless the court held that the rule of the common law as to the doctrine of the safe place applied. As sustaining this contention reference may be had to the following cases: *Consolidated Coal Co. of St. Louis v. Scheiber*, 167 Ill. 539, 47 N. E. 1052; *Big Hill Coal Co. v. Abney*, 125 Ky. 355, 101 S. W. 394; *Sloss-Sheffield Steel & Iron*

*Co. v. Green*, 159 Ala. 178, 49 South. 301; *McKenzie v. North Coast Colliery Co.*, 55 Wash. 495, 28 L. R. A. (n. s.) 1244; *Hemingson v. Carbon Hill Coal Co.*, 62 Wash. 28, 112 Pac. 1111; *Central Coal & Coke Co. v. Williams*, 173 Fed. 337, 97 C. C. A. 597; *Tennessee Coal, Iron & R. Co. v. Garrett*, 140 Ala. 563, 37 South. 355.

But assuming that the statute in question is the sole and only standard to which reference must be had to measure and fix responsibility, there is nothing in the law which would render illegal a practice, either the result of custom or express agreement, by which the master would undertake to see that a certain portion of the entry should be inspected by him and another portion inspected by the servant. (*Edwards v. Lam*, 132 Ky. 32, 119 S. W. 175, 131 S. W. 795.)

*Messrs. Gunn, Rasch & Hall, Mr. W. M. Johnston and Mr. A. C. Spencer*, for Respondents, submitted a brief; *Mr. E. M. Hall* argued the cause orally.

Appellant contends that the well-settled rules of common law, requiring the master to provide a safe place to work, have not been changed or modified by this statute; also, that the term "working-place" has a well-defined meaning at common law, and that the term as used in the statute means the same thing. In support of this latter contention he cites the cases of *Welty v. United States*, 14 Okl. 7, 76 Pac. 125, and *Axhelm v. United States*, 9 Okl. 321, 60 Pac. 98. The first of these cases holds that where a statute uses the word "murder" without defining it, the common-law definition of murder is intended. The latter case makes the same holding on the words "robbed" and "robbery."

We submit that the words "working place" have no definite meaning at common law, such as have the above terms. The "working place" depends upon the particular facts in each case. However, the statute in question removes any doubt that might otherwise exist as to the place of loading the car being a part of the miner's working place, as it expressly mentions the place of loading as a part of the place he must examine upon entering the mine.

The authorities cited by appellant in support of his contention that the statute in question here has not in any way abrogated the common-law rule as to a safe place to work do not construe statutes at all similar to ours. In the case of *Stag Canyon Fuel Co. v. Rose* (Tex. Civ. App.), 145 S. W. 677, it was a rule of the employer, and not a statute, that required the employee to inspect his working place, and which was held not to abrogate the master's common-law duty. It was also the force and effect of a rule of the master, and not of a statute, that was considered in *Consolidated Coal Co. of St. Louis v. Scheiber*, 167 Ill. 539, 47 N. E. 1052. As to the other cases cited by appellant on that question, we respectfully submit that they are not in point or at all applicable to the law and facts involved in this case.

Manifestly, it was the intention of the legislature to modify the common-law rules as to working places and the inspection thereof, so far as coal mines are concerned, by the enactment of such law. It is therefore the law and public policy of this state that the employees in coal mines must themselves perform certain duties intended for their better protection and safety, which at common law were required only of the master. This law has not entirely abrogated the master's duties along these lines, but has simply made it the duty of the employee as well as of the master. It is just as important to the welfare of the state, and to the many miners therein as a whole, that the employee strictly perform this mandatory duty imposed upon him by statute, as that the master perform his duties in this regard. Plaintiff did not perform the statutory duty imposed upon him. His negligence or failure to perform his duty as required by statute was a violation thereof and was the proximate cause of the injury, regardless of what the defendant did or omitted to do, and, under well-established principles, precludes plaintiff from recovering. (White on Personal Injuries in Mines, sec. 354; Thompson on Negligence, sec. 204; *Young v. Chicago, Milwaukee & St. Paul Ry. Co.*, 100 Iowa, 357, 69 N. W. 682.)

Can a mandatory statute be set aside or evaded by a custom or rule between individuals? Appellant seeks to relieve him-

self from the performance of his duty, imposed upon him by statute, of examining his working place upon entering the same, by offering evidence to show the existence of a custom whereby the mine operator agreed or assumed to perform a certain part of such duties and thereby dispense with the double inspection of the miners' working place provided for by statute. The only case cited in support of this contention is *Edwards' Admr. v. Lam*, 132 Ky. 32, 119 S. W. 175, 131 S. W. 795. This case is clearly distinguishable. There was an agreement between the master and employees whereby the latter were to employ a man to "shoot the mines." There is nothing to show that any statute made it the duty of either the master or the employees to do such work. Therefore, such an agreement did not relieve any person of a duty imposed by statute or violate any statute.

Appellant admits that upon entering the place where, in the performance of his duty, he was required to work in loading the car, he did not examine the place of work; also admits that if he had performed the duty thus imposed upon him by the statute, that he would have found the loose chunk of coal that injured him. As he could not relieve himself of this duty, either by contract or custom, as is shown by the authorities below, it follows that evidence of such custom was properly excluded, and that, as a matter of law, he is not entitled to recover, and the judgment of the lower court should be affirmed. (*Young v. Chicago, Milwaukee & St. Paul Ry. Co.*, *supra*; *Voshefskey v. Hillside Coal & Iron Co.*, 21 App. Div. 168, 47 N. Y. Supp. 386; *Little v. Southern R. R.*, 120 Ga. 347, 102 Am. St. Rep. 104, 66 L. R. A. 509, 47 S. E. 953; *Missouri K. & T. Ry. Co. v. Roberts* (Tex. Civ. App.), 46 S. W. 270; *Smith v. Milwaukee Builders & Traders' Exchange*, 91 Wis. 360, 51 Am. St. Rep. 912, 30 L. R. A. 504, 64 N. W. 1041; *Chicago & E. R. Co. v. Lawrence*, 169 Ind. 319, 79 N. E. 363, 82 N. E. 768.)

MR. JUSTICE SANNER delivered the opinion of the court.

On July 12, 1911, the appellant was employed by respondent company as a coal miner in what is known as "west 5 entry, No. 2 vein, east side mine," at Red Lodge. While loading coal

into a car in the course of his employment, a large piece of coal, which had without his knowledge become loose in the roof or walls of the entry, fell upon and seriously injured him; hence this action. He grounds his right to recover upon the allegations that an inspection and sounding of the roof and walls would have disclosed the presence of the loose coal; that it was the duty of respondents to inspect the roof and walls of the entry, and if any loose rock or coal existed to remove the same, and to timber such places along said entry where such timbering was necessary to prevent rock or coal from falling, and that such duty the respondents negligently failed to observe. In the answer it is alleged that the coal which the appellant was loading at the time he was injured was coal that shortly before had been blasted and broken from the face of the entry in the usual and customary manner; that he was loading the coal from the place where it had fallen and had been deposited by the force of the blast; and that, under the terms and conditions of his employment as a coal miner, it was his duty, and he was required, to look after and safeguard his own working place and see that it was in a reasonably safe condition; that he was required to provide for his own safety against the danger and risk from the falling of the roof and walls of the entry at his working place; that he failed to take precautions for his own safety and carelessly failed to examine the walls and roof to ascertain whether the same were safe and free from loose rock and coal liable to fall; and that the injuries received were due to his own fault. In the reply it was admitted that the coal the appellant was loading at the time he was injured had shortly before been blasted in the usual and customary manner, and that he was loading this coal from the place where it had been deposited by the force of the blast. He denied that it was his duty to look after the safety of the place where he was injured, or that his injuries were due to his own fault.

Upon the trial it was either admitted or established that the accident occurred at a point seventy or seventy-five feet from the face of the entry, at a place where and at a time when appellant and his associate were loading the coal blasted out by



the preceding shift; that they had just come on shift, and this work was part of their duty as miners; that they had inspected the entry for a distance of fifty feet from the face but no further; that the appellant could not tell without an inspection by sounding that the piece of coal which fell upon him was loose and likely to fall, but its presence and character would have been revealed through an inspection by sounding so that it could be picked down; no such sounding was done by either appellant or respondents; that blasting affects the roof and walls of the entry for not to exceed ten feet from the face, but loosening of the walls and roof is accomplished by the action of air to which this portion of the entry in question had been exposed for nearly a month; that as the result of the accident appellant sustained serious injuries. Appellant also sought to show the existence of an agreement, rule or custom by which the miners were to examine and keep safe the entry for a distance of fifty feet from the face, and the company to do likewise beyond that point; but this the trial court would not permit, being of the opinion that by Chapter 120, Twelfth Session Laws, called the "Coal Mining Code," the duty is imposed upon the miner to examine and keep safe his own working place; that his "working place," within the meaning of section 83 of that Act, is wherever as miner he is required to mine or load; and that the existence of any rule, custom or agreement in derogation of this duty is immaterial. In further expression of these views, the plaintiff was nonsuited, and error is assigned accordingly.

1. At the common law the rule undoubtedly is that it is incumbent upon the master to exercise ordinary care and diligence to provide his employee with a reasonably safe place in which to work; and the employee is justified in assuming this duty to have been performed, so that, though bound to observe and [1] protect himself against such dangers as are open and obvious to his senses, he is not required to stop, examine, and experiment for himself to see if the place assigned to him is a safe one. (*Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673; *Schroder v. Montana Iron Works*, 38 Mont. 474, 100 Pac. 619.) This rule does not obtain "when the plaintiff and his

fellow-servants are creating the place of work; when it is constantly being changed in character by the labor of the men working upon it; when it only becomes dangerous by the carelessness or negligence of the workmen" (*Shaw v. New Year G. Min. Co.*, 31 Mont. 138, 77 Pac. 515; *Thurman v. Pittsburg & Mont. Co.*, 41 Mont. 141, 108 Pac. 588); but it does obtain where the place is a completed one, as, for instance, that part of a mine tunnel which is behind the miner engaged in driving it (*Kelley v. Fourth of July Min. Co.*, 16 Mont. 484, 41 Pac. 273). The argument is that, since these rules apply as well to a coal mine as to any other place of employment (*Allen v. Bear Creek Coal Co.*, *supra*; *Tennessee Coal etc. Co. v. Garrett*, 140 Ala. 563, 37 South. 355; *Central Coal & Coke Co. v. Williams*, 173 Fed. 337, 97 C. C. A. 597; *McKenzie v. North Coast Colliery Co.*, 55 Wash. 495, 28 L. R. A. (n. s.) 1244, 104 Pac. 801), and since under them the appellant could have recovered, he should still be allowed to recover because the Coal Mining Act, by failing to define what the "working place" is which the miner must examine and keep safe, must be presumed to mean the working place as understood at common law.

We do not know of any precedent or principle by which the [2] working place of a coal miner, which at common law he must keep safe, is precisely defined; but if the working place as understood at common law is merely the face of the entry or that portion of the entry the walls or roof of which might be affected by blasting, then we think a specific modification in that regard is indicated by section 83 of the Coal Mining Act (Laws 1911, Chap. 120), as follows: "Each miner shall examine his working place upon entering the same and shall not commence to mine or load until it is made safe. He shall be very careful to keep his working place in safe condition at all times. Should he at any time find his place becoming dangerous from any cause or condition, to such an extent that he is unable to take care of the same personally, he shall at once cease work and notify the mine foreman. \* \* \* " In passing, we may add that by section 103 of the same Act penalties are provided for its violation, including violations by miners of section 83. The plain

meaning of section 83, as it seems to us, is that before he goes to work the miner must examine the place where his work is to be done; if he is about to mine, he must examine the place where his mining is to occur; if he is about to load, he must examine that part of the workings throughout which the duty of loading is to be performed. While he is at work he must keep safe the place where he is working, and whenever he finds it unsafe, whether as the result of his operations or otherwise, he must make it safe, or, if he cannot do that, he must quit the work and report. It is thus apparent that the "working place" which the miner must under the statute examine and keep safe is a varying area, and that the duty imposed is a positive one. The suggestion is made that this cannot be so, because the Act by its section 70 requires the master to see that "all loose coal, slate and rock overhead in rib in traveling ways, where miners have to travel to or from their work," are taken down or carefully secured, and by its section 73 requires the foreman or his assistant to visit and examine every working place at least each alternate day and see to the security of the same. The conclusion does not follow; rather the clear intent of the statute is that [3] such places as are the seat of active operations shall be looked after by both master and servant, and the mere fact that at a given time one of such places may not be the seat of active operations, and may therefore at such time be subject to the exclusive inspection of the master, does not absolve the employee from the duty of examination when that place is, or is about to become, the scene of his labors. As to the place at which the appellant was injured, the respondents should have seen to its safety; but it was also the duty of the appellant to refrain from loading until he had examined it and had made it safe. Neither party having observed the statutory duty, and [4] the accident being due to this nonobservance, the parties were *in pari delicto*, and the case is squarely within the reasoning of *Melville v. Butte-Balaklava C. Co.*, 47 Mont. 1, 130 Pac. 441, in which, under analogous circumstances, the right to recover was denied. (See, also, *White on Personal Injuries in*

Mines, sec. 354; Thompson on Negligence, sec. 204; *Young v. Chicago, M. & St. P. Ry. Co.*, 100 Iowa, 357, 69 N. W. 682.)

2. No difficulty is met in the ascertainment of the intent with which the Act was passed—the evil sought to be remedied, the [5] good to be attained. Every section speaks the legislative realization of the hazards of coal mining—hazards which may involve not only the loss of valuable lives, but other consequences of grave import to society, and which, in the interest of the employee, the employer, and the public, it is imperative to reduce. Can such an Act, can provisions therein imposing duties designed to accomplish such a purpose, be nullified by private agreement, private rule, or private custom? The answer is given in *Edwards' Admr. v. Lam*, 132 Ky. 32, 119 S. W. 175, the very case relied on by appellant to support his contention. In that case the effect of an agreement between the employer and employees, which was not in derogation of the statute, was involved, and touching it the court said: "The duty of the mine owner, independent of statutory regulation and that primary duty to furnish a reasonably safe place in which to work, may vary according to the contract between him and his laborers. \* \* \* If the employer and laborers all agree that the latter are to be of the same or a common grade, and shall have control themselves of certain features in the work, designed for their better protection, we are unable to see wherein the arrangement is illegal, so long as the public policy and the statutes are not violated." But that the plain provisions and clear purpose of a statute may not be set at naught by agreement, rule, or custom is too well settled for discussion. (*Chicago & E. R. Co. v. Lawrence*, 169 Ind. 319, 79 N. E. 363, 82 N. E. 768; *Voshefskey v. Hillside C. & I. Co.*, 21 App. Div. 168, 47 N. Y. Supp. 386; *Young v. Chicago, M. & St. P. Ry. Co.*, *supra*; *Smith v. Milwaukee B. & T. Exchange*, 91 Wis. 360, 51 Am. St. Rep. 912, 30 L. R. A. 504, 64 N. W. 1041; *Little v. Southern Ry. Co.*, 120 Ga. 347, 102 Am. St. Rep. 104, 66 L. R. A. 509, 47 S. E. 953; *Missouri, K. & T. R. Co. v. Roberts* (Tex. Civ. App.), 46 S. W. 270.)

The district court was clearly correct in both the positions taken, and the order of nonsuit necessarily followed. The judgment appealed from is therefore affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
CONCUR.

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IN RE WILLIAMS' ESTATE. DAVIS, ADMR., ET AL., APPEL-  
LANTS, v. MELZNER, ADMR., RESPONDENT.

(No. 3,200.)

(Submitted April 15, 1913. Decided May 5, 1913.)

[132 Pac. 421.]

*Executors and Administrators—Final Accounts—Settlement—  
Claims Against Estate Unpaid—Advances—Payment Proper,  
When.*

**Executors and Administrators—Final Accounts—Not to be Approved  
Until When.**

1. Where an executor or administrator has property in his hands available for the payment of claims outstanding against the estate under his control, his final account cannot be settled or approved until he has made an affirmative showing that they have been paid, or that he has exhausted the property available for such purpose.

**Same—Settlement of Accounts—Conclusiveness.**

2. Orders settling the accounts of an administratrix, in which claims for money advanced by her for the benefit of the estate had been allowed, were conclusive on the estate and all persons interested therein not laboring under any legal disability, in the absence of an affirmative showing on the face of the claims that they were illegal.

**Same—Advances to Estate—Payment.**

3. While an executor or administrator has no power, by making advances to the estate, to make it his debtor regardless of the character or quality of his claim, such advances, made suitably and in good faith for its benefit, may be allowed and recovered as claims against the estate.

**Same—Settlement of Final Accounts—Debts Remaining Unpaid—Case at Bar.**

4. *Held*, that an order made by the district court settling and approving the final account of an administrator was error, where it appeared that claims against the estate for advancements made for

its benefit, though theretofore properly allowed, remained unpaid, and there was no showing that all property available for their payment had been exhausted.

*Appeal from District Court, Silver Bow County; John B. McClernan, Judge.*

APPLICATION by A. B. Melzner, administrator *de bonis non* of Henry Williams, for the settlement of his final account, to which Andrew J. Davis and others filed objections. From an order allowing the account, objectors appeal. Reversed and remanded.

*Mr. George F. Shelton*, and *Mr. E. N. Harwood*, for Appellants, submitted a brief; *Mr. Fred. J. Furman*, of counsel, argued the cause orally.

The court had jurisdiction of the estate of Henry Williams, deceased; and the claim under consideration arose in the course of the administration of that estate by reason of the fact that a former administratrix thereof advanced and paid out of her own individual money claims and expenses allowed against that estate by decrees of the court, and died before those advancements had been reimbursed. It is not a claim against the estate of the character of a debt owing by the decedent when he died, but a demand upon the property of the estate that has been passed upon by both the administratrix and the court, and established by the court's decrees. The administrator *de bonis non* could not, under any circumstances, ask for the settlement of a final account until this indebtedness had been paid. The contest and objections of Andrew J. Davis should have been allowed, the prayer of his petition should have been granted; and the failure of the court so to do was manifest error. (See *Dodson v. Nevitt*, 5 Mont. 518, 6 Pac. 358; *In re Moore*, 96 Cal. 522, 31 Pac. 584; *Estate of Carpenter*, 146 Cal. 661, 80 Pac. 1072; *Munroe v. Holmes*, 9 Allen (Mass.), 244; *Munroe v. Holmes*, 13 Allen (Mass.), 109; *Foster v. Bailey*, 157 Mass. 160, 31 N. E. 771; *Maupin v. Boyd*, 5 Mo. 106; *Pettingill v. Pettingill*, 60 Me. 411; *Trimble v. James*, 40 Ark. 393; *Liddel v. McVickar*, 11 N. J. L. 44, 19 Am. Dec. 369.)

*Mr. Peter Breen*, for Respondent, submitted a brief and argued the cause orally.

Respondent can find no authority for the administratrix to make vast expenditures of her own money for the alleged benefit of the estate, and then later come into court with a claim against the said estate for practically two-thirds of its value because of said alleged advancements. The Code is silent as far as advances are concerned. We have examined the authorities cited by appellant, and respectfully suggest that they refer to a different state of facts than those complained of, and cite the following cases in support of our contention that the administratrix may not recover the advancements made by her: *Church on New Probate Law and Practice*, 1089; *First National Bank v. Collins*, 17 Mont. 433, 52 Am. St. Rep. 695, 43 Pac. 499; *In re Knight's Estate*, 12 Cal. 200, 73 Am. Dec. 531; *Tompkins v. Weeks*, 26 Cal. 50; *Elizalde v. Murphy*, 4 Cal. App. 114, 87 Pac. 245; *Smith v. Goethe*, 147 Cal. 725, 82 Pac. 384; *In re Rose's Estate*, 80 Cal. 166, 22 Pac. 86; *Willis v. Willis*, 9 Ala. 330; *Lyon v. Lyon*, 43 N. C. 201.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On February 13, 1912, A. B. Melzner, administrator *de bonis non* of the estate of Henry Williams, deceased, presented to the district court of Silver Bow county his final account of his administration of said estate and prayed for its settlement and allowance. Due notice of the time and place for hearing such report was given, and within the time allowed A. J. Davis, as special administrator of the estate of Rachel E. Williams, deceased, and in his own right as the residuary legatee under the last will and testament of Rachel E. Williams, presented objections in writing to the allowance of such account upon the ground that certain alleged claims against the estate of Henry Williams, deceased, had not been paid. In the written objections it is set forth that from August 12, 1902, to March 3, 1907, Rachel E. Williams was the duly appointed, qualified, and act-

ing administratrix of the estate of Henry Williams, deceased; that during such period of time she made advances from her own private funds for the use and benefit of the estate of Henry Williams, deceased; that she made reports of her administration, including accounts of the funds so advanced by her, to the district court having jurisdiction of the administration of said estate; that after due notice her several reports were approved, allowed and settled, and the court thereby adjudged that the estate of Henry Williams, deceased, was indebted to the said Rachel E. Williams in sums aggregating \$34,000 in round numbers; that no part of these sums has ever been paid; and that on the 3d day of March, 1907, Rachel E. Williams died intestate, without having concluded the administration of the estate of Henry Williams, deceased. It is alleged that under the terms of her will A. J. Davis became residuary legatee; that, because of delay in the probate of her will, Davis was appointed special administrator of her estate. It is further alleged that the administrator *de bonis non* in his final account has failed to report to the court the amount and character of the real or personal property in his possession, and has failed to report what, if any, funds he has available to pay the indebtedness against the estate of Henry Williams, deceased. The prayer is that the final report be not allowed; that the administrator *de bonis non* be required to set forth and exhibit the amount and character of the property in his possession as such administrator, including money belonging to the estate of Henry Williams, deceased; and that if sufficient funds are not immediately available to pay the claims alleged to be due to the estate of Rachel E. Williams, deceased, then that an order be made for the sale of sufficient personal property to satisfy such claims, and if the personal property be insufficient, that an order for the sale of sufficient of the real estate to satisfy the claims be made. On the day appointed for hearing the final account, the court heard evidence touching the ordinary receipts and disbursements of the estate, the compensation theretofore received by the administrator *de bonis non*, and the balance due to him, the employment of counsel, and the value of the services rendered, and thereupon



made and entered an order solemnly reciting that, "no exceptions or objections in writing to said account having been made or filed, \* \* \* it is ordered and decreed that the said account be, and the same hereby is, in all respects as the same was rendered and presented for settlement, approved, allowed, and settled." From that order Davis appealed.

We are not informed as to the theory upon which the trial court proceeded in ignoring the written objections made by A. J. Davis to the final account of the administrator *de bonis non*. We are not prepared to say that the objections are sufficient to entitle them to serious consideration. While it is set forth that the several claims made by Rachel E. Williams against the estate of Henry Williams, deceased, were allowed, it is not anywhere alleged that the orders allowing them have not been vacated or set aside, or that appeals have not been taken therefrom. It is alleged that there is certain real estate in the possession of the administrator *de bonis non* belonging to the estate of Henry Williams, deceased; there is not, however, any allegation that the administrator has any personal property available for the payment of estate debts. While it is further alleged that no part of the several claims allowed to Rachel E. Williams has ever been paid, there was not any offer of proof in support of this allegation. But, independently of the objections made, the order of the trial court is indefensible.

It is very clear from sections 7661 and 7662, Revised Codes, that a final account of an administrator or executor cannot be settled or approved so long as there are outstanding claims [1] against the estate which have not been paid, if there is any property in the hands of the executor or administrator available for the payment of such claims, in whole or in part.

And it is equally apparent that it was the intention of the legislature that, before a final account be approved, the executor or administrator must show affirmatively that he has paid all outstanding claims against the estate or that he has exhausted the property available for such purpose, and in the absence of such showing his final account cannot be approved.

Assuming that there is sufficient in this record to show outstanding claims in favor of the estate of Rachel E. Williams, deceased, and that such claims have been settled and allowed in the reports which she made to the district court as [2] administratrix, in the absence of any affirmative showing upon the face of such claims that they are illegal, the orders settling those accounts became conclusive upon the estate and upon all persons interested in the estate, not laboring under any legal disability. (Sec. 7649, Rev. Codes; *In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38.)

While it is not within the power of an executor or administrator by advances made by him to the estate to thereby make the estate his debtor regardless of the character or quality of his claim, yet it is equally well settled that such advances, made suitably and in good faith for the benefit of the estate, may be allowed and recovered as claims against the estate. (18 Cyc. 443.)

Our attention is directed to the following language employed by this court in *Dodson v. Nevitt*, 5 Mont. 518, 6 Pac. 358: "Claims against the estate are those in existence at the date of the death of the deceased. Other claims against an estate are those incurred by the administrator or executor in settling the estate, and are properly denominated expenses of administration." It is now insisted that by this classification a claim for advances made to an estate cannot be considered a claim against the estate; but the language above quoted is to be understood in the light of the question before the court for determination at that time. The point at issue was whether or not a claim for services performed at the instance and request of an executor of an estate constituted a claim against the estate. The court held that it did not; that, if anything, it was an item in the expense of administration of the estate. If the language quoted be accepted literally, it would preclude a claim for funeral expenses; but the statute in force at the time the decision above was rendered (sec. 273, Second Div., Rev. Stats. 1879) particularly recognized a claim for funeral expenses as a claim against an estate.

It is no argument to say that a claim for advances should not be allowed, since the administrator would be placed in the situation of passing upon his own claim. Section 7542, Revised Codes, specifically recognizes the fact that an executor or administrator may be a creditor of an estate, and provides the method of allowing such a claim.

- In making the several orders approving the advancements made by Rachel E. Williams, we must indulge the presumption [4] that the district court performed its official duties and made due inquiry as to the character of the advancements and the purposes for which they were made, and that before allowing them the court determined that they were for the use and benefit of the estate and properly chargeable against it. Indulging this presumption, the orders allowing those several claims became conclusive, and, before the final report of the administrator *de bonis non* could be approved, it was incumbent upon him to show that those claims had been paid or that all available property for their payment had been exhausted. The prayer of the objector should have been granted.

The order of the district court is reversed and the cause is remanded for further proceedings.

. *Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

AMERICAN BONDING CO., APPELLANT, v. STATE SAVINGS  
BANK, RESPONDENT.

(No. 3,251.)

(Submitted April 17, 1913. Decided May 7, 1913.)

[133 Pac. 367.]

*Public Officers—Suretyship—Liability—Actions—Subrogation  
—Complaint—Insufficiency—Equity—Status of Party Hold-  
ing Legal Title.*

*Equity—Subrogation—Nature of Remedy.*

1. The doctrine of subrogation is invoked by courts of equity to the end that justice may be done as nearly as possible, its application depending upon the circumstances of each particular case.

*Public Officers—Suretyship—Liability—Subrogation.*

2. Where a surety company had to make good a county's loss occasioned by the misconduct of one of its officers in issuing fictitious jurors' certificates, which had been purchased by a bank and paid by the county, it was incumbent upon the company to show in its complaint, in order to entitle it to subrogation to the right of action which the county had against the bank for the recovery of the money paid under a mistake as to its liability, that, as between it and the bank, in equity and good conscience the latter should bear the loss.

*Same—Complaint—Insufficiency.*

3. *Held*, under the above rule, that the complaint which did not charge negligence or wrongdoing on the part of the bank in purchasing the fraudulent certificates, but rather disclosed that it acted in good faith in the premises and followed an established custom in dealing in them, even though they did not bear the impress of the official seal as required by law, failed to show such a state of facts as to entitle the surety company to be subrogated to the right of the county to recover the money paid to the bank.

*Same—Equities Balanced—Status of Party Holding Legal Title.*

4. Where the equities of the parties are evenly balanced, the position of the one who has the legal title to the thing in controversy is the better.

*Same—Suretyship—Liability—Subrogation—Rights of Parties.*

5. *Semble*: It would seem that a bank which cashed fraudulent county certificates would, in the event the county had refused to pay them, have had a right of action against the surety company which for a consideration undertook to be responsible for the official misconduct of the person issuing the same; therefore, the company may not be said to have had a cause of action against the bank to recover what it was obliged to pay.

*Appeal from District Court, Silver Bow County; John B. McClernan, Judge.*

ACTION by the American Bonding Company of Baltimore against the State Savings Bank. Judgment for defendant. Plaintiff appeals. Affirmed.

*Messrs. Walsh, Nolan & Scallon*, for Appellant, submitted a brief; *Mr. Wm. Scallon* argued the cause orally.

The certificates upon which the money was drawn by the respondent were issued in the form prescribed by section 3179 of the Revised Codes. This court held in *In re Farrell*, 36 Mont. 254, 92 Pac. 785, that they were utterly void. Not only were they a nullity, but the indorsement of the payee on each was a forgery, if forgery could have been predicated of them.

The respondent had, accordingly, no just claim against the county. The instruments upon which it secured the money were in no sense negotiable, were supported by no consideration, and no title to anything passed by their transfer with or without indorsement. The county could, unquestionably, had it seen fit to do so, have recovered from the bank every dollar paid to it upon the certificates, in an action for money paid by mistake. (3 Randolph on Commercial Paper, 1486.) And no negligence on the part of the treasurer in making the payment would bar the right. (*Hathaway v. County of Delaware*, 185 N. Y. 368, 113 Am. St. Rep. 909, 13 L. R. A. (n. s.) 273, 78 N. E. 153.) Nor, obviously, would fraud or collusion of the treasurer in making the payment. Upon principles thoroughly established, the treasurer, had he been called upon to pay the county, would have been subrogated to its right to proceed against the bank. Indeed, he could have proceeded directly against it, though no steps at all had been taken to require him to restore the amount to the county. The authorities chose to proceed against the clerk and his sureties, but obviously the parties who actually got the money out of the treasury without any just right to it, are the ones who may be said to be primarily liable for the return of it, and the surety paying is unquestionably subrogated. The case of *National Surety Co. v. State Savings Bank*, 156 Fed. 21, 13 Ann. Cas. 421, 14 L. R. A. (n. s.) 155, 84 C. C. A. 187, is directly in point. In that case the orders were apparently genuine, and the court held that their payment by the county was reasonably to be anticipated, and though the warrants in this case

carried on their face evidence of their invalidity, wanting, as they did, the seal of the county, this court held that the payment of them was a consequence reasonably to be apprehended from Farrell's acts as issuing them, and that consequently his principal and the surety of the latter, the appellant here, were responsible for its acts in that regard. The whole subject is exhaustively considered by the court, and the conclusion at which it arrived fully justified upon reason and authority. The learned judge writing the opinion insists that had the county assigned to the surety its right to recover of the bank, no doubt could arise as to the right of the former to maintain an action against the latter for reimbursement. The case came before the court, as does this action, upon a judgment entered on a demurrer to the complaint. It was sent back for trial and came again before the appellate court for review. A judgment for the defendants was again rendered in consequence of facts shown at the trial constituting, as the court held, an affirmative defense. The judgment so entered was affirmed, the principles upon which the case was decided in the first instance, as set out in the opinion above referred to at length, being adhered to. (*National Surety Co. v. Arosin*, 198 Fed. 605, 117 C. C. A. 313.) The orders considered in all litigation reported in the cases cited were complete on their face, fair and regular. It was held that, under the conditions shown, the bank was not guilty of any negligence in purchasing them. Some such facts as controlled the court in its final disposition of the case may eventually be made to appear in this action, but the essential difference will remain that the warrants in question here were void on their face for want of a seal. As the case now stands, it does not appear that the respondent used any diligence at all, for the purpose of ascertaining the genuineness or regularity of the warrants, and, it must be presumed that, if any diligence had been used, the irregularities in the issuance of these papers and their illegality would have been discovered, and, of course, the fact of the absence of the seal would have been noticed.

*Mr. W. D. Kyle, Mr. Frank C. Walker, and Mr. Charles R. Leonard*, for Respondent, submitted a brief; *Mr. Kyle* argued the cause orally.

Negligence or misconduct on the part of defendant is not shown in complaint, which, therefore, is insufficient to show liability of defendant to plaintiff. The theory of the plaintiff apparently is that the bank, having been paid money on certificates which were worthless, thereby became liable to the plaintiff upon its having paid the amount thereof to the county of Silver Bow, under the doctrine that by the payment of said money it was subrogated to the rights of the county against the bank. The facts pleaded in the complaint, we insist, do not warrant any such contention. The respondent denies that the relative positions as between it and the county of Silver Bow and the appellant are the same. The county is not liable to the bank for the misconduct of deputy Farrell, whereas the plaintiff expressly obligated and bound itself to indemnify not only the county but any other party against loss caused by the act of its principal or any of his deputies. (*Sievers v. San Francisco*, 115 Cal. 648, 56 Am. St. Rep. 153, 47 Pac. 687; secs. 384, 398, Rev. Codes.) The complaint shows that by a uniform custom and practice, juror and witness certificates had at all times been issued without being under seal. The existence of such a custom and practice, we submit, absolved defendant bank from the duty of only treating juror certificates which were under seal as valid and binding obligations of the county, and that it was justified in recognizing such certificates not under the seal of the county as just and valid and binding obligations, and that in so acting with reference to such certificates it cannot be charged with any negligence. While we recognize it to be the law that a custom or usage cannot prevail as against a rule of law, we do insist that parties in the course of dealings with each other can establish a usage or custom affecting their rights which will be recognized by the courts even though it conflict with some fixed principle of law. "Usages are sustained where they relate to modes of action, a particular course of dealing, or a peculiar

method of transacting business, although they do, in fact, affect the legal rights of the parties; but not where they amount to the adoption of a peculiar or local rule of law, contrary to the terms of the contract, or to a general rule of law applicable to its construction." (*Dickinson v. Gay*, 7 Allen (Mass.), 29, 83 Am. Dec. 656.) "Custom known and acquiesced in by the parties will excuse the nonperformance of a duty prescribed by law." (*Governor v. Withers*, 5 Gratt. (Va.) 24, 50 Am. Dec. 95.) "A local custom which relates simply to the mode of the performance of a contract or to its interpretation, if established and known to the parties, may be enforced." (*Geyser etc. Co. v. Stark*, 106 Fed. 558, 564, 53 L. R. A. 684, 45 C. C. A. 467, 21 Morr. Min. Rep. 220; see, also, 29 Am. & Eng. Ency. of Law, 2d ed., 380.)

The complaint fails to show that plaintiff has no other remedy than subrogation, and is therefore insufficient. It fails to state whether or not Davies, principal in the bond on which the plaintiff was surety, is financially able to reimburse it for its loss, or whether or not the plaintiff has any security in respect to such loss. Without such allegations we submit the complaint is insufficient to state facts authorizing the granting of any relief to the plaintiff as against the defendant. (6 Pomeroy's Equity Jurisprudence, 3d ed., sec. 923; *Pierson v. Borough of Haddonfield*, 66 N. J. Eq. 180, 57 Atl 471.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

From the first Monday of January, 1905, to the first Monday in January, 1909, W. E. Davies was the duly elected, qualified and acting clerk of the district court of Silver Bow county. During a portion of that period W. P. Farrell was his chief deputy. The American Bonding Company of Baltimore was the surety on Davies' official bond. During the time Farrell was acting as deputy clerk he issued false and fictitious jurors' certificates, none of which bore the imprint of the official seal, and these certificates, to the amount of \$2,076, came into the possession of the State Savings Bank of Butte and were by it



presented to the county treasurer and paid. The fraudulent character of the certificates having been discovered, the county made demand upon the clerk of the district court and the bonding company, his surety, to repay the amounts which the county had paid out on such certificates, and, this demand having been refused, action was commenced by the county and prosecuted to favorable judgment, which judgment was affirmed on appeal by this court. (*County of Silver Bow v. Davies et al.*, 40 Mont. 418, 107 Pac. 81.) The bonding company having paid the judgment, which included the amount received by the State Savings Bank, took an assignment of any right of action which the county may have had against the bank, and thereupon commenced this action to recover from the bank the \$2,076 which the bank had received from the county upon the fictitious certificates held by it. The complaint sets forth the foregoing facts somewhat more in detail, and concludes by alleging that the bank has not repaid or returned to the county or to the bonding company the \$2,076, or any part thereof. To this complaint a demurrer was interposed and sustained, and plaintiff electing to stand upon its complaint, suffered judgment to be entered against it and appealed. The only question presented for our determination is: Does the complaint state a cause of action in favor of the bonding company and against the bank?

The facts concerning Farrell's speculations and the character of the instruments which he issued will be found detailed at length in *In re Farrell*, 36 Mont. 254, 92 Pac. 785, and in *County of Silver Bow v. Davies et al.*, referred to in the statement above. Appellant insists that the certificates held by the bank were void, citing *In re Farrell*, above, and therefore the bank had no just claim against the county for their payment; that, having paid the bank the face value of the certificates, the county could have recovered back the money so paid in an action for money paid by mistake. To this extent appellant's contention may be conceded for the purposes of this appeal. It is further insisted that since the county chose to proceed against the district clerk and the surety company,—the surety on his official bond,—to compel them to make good the county's

loss, the surety company, upon paying the amount which the bank had received from the county, thereby became subrogated to the right which the county had to compel the bank to repay the amount which it had received. With this contention we do not agree. Furthermore, it must be conceded that if the bank would have had a cause of action against the bonding company in case the county had refused to pay the fictitious certificates, then the bonding company cannot have a cause of action against the bank in this instance.

1. Assuming that the county of Silver Bow had a cause of action against the bank to recover back the money it paid out on spurious certificates, it does not follow that by paying the county's loss the surety on the clerk's official bond became sub-  
[1] rogated to the county's right. The doctrine of subrogation had its origin in the civil law. It has been adopted and invoked by the courts of equity in order that justice may be done as nearly as possible. The application of the doctrine must therefore depend upon the circumstances of each particular case. When, therefore, this surety company seeks to be  
[2] subrogated to the right which the county may have had against the State Savings Bank, it is necessary that something more be made to appear than that the bank could have been made to repay to the county the amount which it received upon the spurious certificates which it held. The surety company must show that as between it and the State Savings Bank, if either must suffer loss because of Farrell's peculations, in equity and good conscience the bank should be the one to lose. This is the rule recognized with practical unanimity. (*American Bonding Co. v. Welts*, 193 Fed. 978, 113 C. C. A. 598; *United Fidelity & G. Co. v. Title Guaranty & Surety Co.*, 200 Fed. 443.) Does this complaint show such a state of facts? We think not. There is not any charge of negligence or wrongdoing on the  
[3] part of the bank in purchasing the certificates. So far as the complaint discloses, the bank acted in perfect good faith, and was following a common custom in dealing in these certificates without their bearing the impress of the official seal. Someone must suffer now for Farrell's official miscon-

duct. Shall it be the bank which acted in good faith and parted with its money for the spurious certificates issued by Farrell, or shall it be the surety company which for a compensation undertook to be responsible for Farrell's official delinquencies not only to the state, and to Silver Bow county, but to this bank as well? To such an inquiry a court of conscience can make but one answer. Upon the showing made in its complaint, the surety company has failed to show itself entitled to be subrogated to the right which the county may have had. (*Stewart v. Commonwealth*, 104 Ky. 489, 47 S. W. 332.) For this reason the complaint does not state a cause of action.

2. According to the allegations of this complaint, the State Savings Bank is in possession of and holds the legal title to the money which it secured from the county upon the fictitious certificates. At law this surety company would not have any right of action against the bank; but to state a cause of action at all it must allege such facts as will appeal to the conscience [4] of a court of equity. If the equities of the respective parties are equally balanced, the position of the defendant—the possessor of the thing in controversy—is the better; in other words, the legal title, added to its equity, prevails over an equal equity which has no legal title to support it. (2 Pomeroy's Equity Jurisprudence, 3d ed., secs. 727, 768; *Fidelity Mut. Life Ins. Co. v. Clark*, 203 U. S. 64, 51 L. Ed. 91, 27 Sup. Ct. Rep. 19.)

3. If the county had refused to pay the certificates held by the bank, would the bank have had a cause of action against the surety company for its loss? The surety company was respon- [5] sible for Farrell's official misconduct (Rev. Codes, sec. 384), to any party injured thereby, and such party could maintain an action for his damages (sec. 398). That it was Farrell's official misconduct which caused the county's loss has been judicially determined. (*County of Silver Bow v. Davies et al.*, above; *Board of County Commissioners v. Sullivan*, 89 Minn. 68, 93 N. W. 1056.) If the county had refused to pay the certificates, the resulting loss to the bank would have been occasioned by the same acts of official misconduct (*Stewart v. Com-*

*monwealth*, above), and it is not any defense that by omitting to stamp the impress of the seal upon the certificates, Farrell avoided punishment or set afloat securities which were invalid. (*County of Silver Bow v. Davies et al.*, above.) It would seem to follow as of course that the bank's right of action against the surety company under such circumstances would be absolute.

To sustain their contentions, counsel for appellant rely upon the decision in *National Surety Co. v. State Savings Bank*, 156 Fed. 21, 13 Ann. Cas. 421, 14 L. R. A. (n. s.) 155, 84 C. C. A. 187. Bourne, the deputy auditor of Ramsey county, Minnesota, fraudulently issued spurious refunding orders on the county treasurer, procured the chairman of the board of county commissioners to authenticate them, indorsed the names of the fictitious payees, and then sold the orders to the State Savings Bank. The bank presented them for payment and received from the county their face value, with accrued interest. The fraud having been discovered, the county brought action against the auditor and the surety company, the surety on his official bond, and recovered. The surety company, having paid the county, commenced an action against the bank to recover the amount which the bank had collected from the county. A general demurrer to the bill was sustained. The surety company appealed to the circuit court of appeals for the eighth circuit. The majority of the court held that Bourne's personal, as distinguished from his official, misconduct would have been the proximate cause of the bank's loss had the county refused to pay the orders, and therefore the surety on the auditor's official bond could not be held responsible for such personal misconduct. But it was Bourne's official misconduct which called the spurious orders into existence. (*Board of County Commrs. v. Sullivan*, above.) If he had issued them to real persons, but to persons not entitled to them, and such persons had negotiated them to the bank, there is not any question that the bonding company would have been liable to the bank for the injury sustained. Now by just what species of legal legerdemain Bourne's forgeries of the indorsements of the fictitious payees, added to his wrongful act in issuing the spurious orders, could

operate to relieve the surety company is beyond our comprehension. It was further held that since the orders were non-negotiable—made so by statute for the very purpose of preventing misuse of them—the bank was guilty of gross negligence in purchasing them without inquiry, and for that reason it could not have recovered from the surety company if the county had refused payment. But, as pointed out in the dissenting opinion of Judge Hook, there was not anything before the court to justify it in assuming the existence of such a state of facts. It was further decided that, since the bank had procured from the county upon these fictitious certificates money to which it was not entitled as against the county, the county might have recovered it back, and since the county proceeded against the surety on the auditor's official bond and enforced payment, the surety company became thereby subrogated to the right which the county might have exercised, to proceed against the bank, and this, too, without any apparent consideration of the relative equities of the respective parties. Upon each of the questions decided, Judge Hook dissented, and in our opinion his position upon each question is unassailable. It is also worthy of note that this case was remanded to the district court for further proceedings; that answer was filed, issues joined, the cause tried, and judgment rendered in favor of the bank on the merits. The surety company again appealed; but this time the same circuit court of appeals—two of the judges being different persons—affirmed the judgment (*National Surety Co. v. Arosin et al.*, 198 Fed. 605, 117 C. C. A. 313), and held that the bank was not guilty of negligence in purchasing the orders; and that it was Bourne's official misconduct in manufacturing the orders which was the primary cause of the loss. Nothing is said upon the question of subrogation. In our opinion, there is not any substantial difference in the facts disclosed upon the trial and those appearing upon the face of the bill in the first appeal, and that the decision upon the second appeal ought to be treated as overruling the decision of the majority upon the first appeal. But whether it be so considered or not, we decline to follow

the majority opinion upon the first appeal as unsound, and as opposed to the decided weight of authority.

The complaint does not state a cause of action, and the judgment of the district court is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

Rehearing denied June 28, 1913.

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TAYLOR, APPELLANT, v. MALTA MERCANTILE CO.,  
RESPONDENT.

(No. 3,253.)

(Submitted April 17, 1913. Decided May 12, 1913.)

[132 Pac. 549.]

*Claim and Delivery—Fraudulent Conveyances—Constructive Fraud—Good Faith—Consideration—Evidence—Immateriality—Immediate Delivery—Actual and Continued Change of Possession—Insufficiency of Proof.*

*Appeal and Error—Evidence—Offer of Proof.*

1. Where an offer of proof was not made and the probable answer of the witness was not apparent, alleged error in sustaining an objection to a question is not reviewable.

*Same—Evidence—Exclusion—Curing Error.*

2. Error in the exclusion of offered testimony is cured by the subsequent admission of substantially the same evidence.

*Fraudulent Conveyances—Constructive Fraud—Good Faith—Evidence—Immateriality.*

3. In an action in claim and delivery based upon constructive fraud in a sale of personal property under section 6128, Revised Codes, testimony offered by the buyer that the bill of sale evidencing the transaction had been filed with the county clerk, and that he had made application for insurance on the property in his own name, was properly refused, since such evidence could only reflect upon the good faith of the parties to the sale,—a matter immaterial in an action in which fraud in law is relied upon.

*Same—Consideration—Evidence—Irrelevancy.*

4. In an action of the character mentioned in paragraph 3 above, evidence of the consideration paid for the property in question was irrelevant.



33 Pac. 335, say: "In the determination of the question, as to the kind of possession necessary to be given, in order to make a sale of personal property valid as against creditors, regard must be had not only to the character of the property, but also to the nature of the transaction, the position of the parties and the intended use of the property. The law only requires that which could naturally be done in an honest business-like transaction, where there was no thought of fraud or concealment." It has been held by this court that the delivery of the keys of a warehouse, in which heavy machinery has been stored, is a delivery of the machinery. (*Western Min. Supply Co. v. Quinn*, 40 Mont. 156, 135 Am. St. Rep. 612, 20 Ann. Cas. 173, 105 Pac. 732.) Surrender of the control of a pasture in which were horses alleged to have been sold, held a sufficient transfer of possession of the horses. (*Leader v. Farmers' L. & T. Co.*, 144 Iowa, 180, 122 N. W. 833.) The delivery of large and heavy machinery, if the parties act in good faith and the vendor surrenders to the vendee their actual possession and control, does not require that they be moved or changed in place. (*Ott v. Sutcliffe* (N. J. Eq.), 60 Atl. 965.) Whether or not the facts shown constituted a change of possession was a question for the jury. (*Rapple v. Hughes*, 10 Idaho, 338, 77 Pac. 722; *Simons v. Daly*, 9 Idaho, 87, 72 Pac. 507.) The undisputed facts in this case show (1) an absolute sale; (2) surrender of dominion over the property by the vendor and assumption of dominion by the vendee; (3) an attempt to give publicity to

2. *Ev.* sale by filing the bill of sale for record; and (4) a symbol-sequent au.

**Fraudulent Conveyance** of the property by delivery of the keys to the vendee. All tend to prove an absolute sale and a delivery

3. In an action in a sale of personal property offered by the

action had been filed w.

application for insurance & *Lewis*, for Respondent, submitted a brief; only refused, since such evidence of counsel, argued the cause orally.

faith of the parties to the sale, in which fraud in law is relied upon

Consideration—Evidence—Irrelevant. There was not any immediate delivery of the property involved:

4. In an action of the character mentioned

evidence of the consideration paid for the property. 1076; *Merrill v. Hurlburt*, Colo. App. 151, 32 Pac. 436;

irrelevant.



*Cobb v. Haskel*, 14 Me. 303, 31 Am. Dec. 56; *Burchinell v. Weinberger*, 4 Colo. App. 6, 34 Pac. 911; *Watkins v. Petefish*, 49 Ill. App. 80; *State v. Durant*, 53 Mo. App. 493; *Byxbee v. Dewey*, 5 Cal. Unrep. 544, 47 Pac. 52.

The following cases also affirm the general rule that in order to avoid the conclusive presumption of fraud in cases such as this, the vendee must take such possession of the property as to give unequivocal notice and advertisement to all the world of the change of possession: *Revercomb v. Duker*, 74 Mo. App. 570; *Kennedy v. Conroy*, 5 Cal. Unrep. 337, 44 Pac. 795; *Lloyd v. Williams*, 6 Colo. App. 157, 40 Pac. 243; *Howard v. Dwight*, 8 S. D. 398, 66 N. W. 935.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action in claim and delivery. The controversy is between W. H. Taylor, who claims to have purchased the property from C. R. Buffington, the original owner, on the one hand, and, on the other, the Malta Mercantile Company, a corporation, which claims to have attached the property in an action by it against Buffington and while Buffington was still the owner and in possession of the property, and to have purchased the same at sheriff's sale upon execution. Upon the trial of the cause the plaintiff offered evidence tending to show the circumstances under which he purchased the property, and what he did with reference to it. At the conclusion of his evidence the court granted a nonsuit. The appeal is from the judgment. The bill of exceptions presents all the evidence received and that offered and rejected.

1. Buffington, a witness for plaintiff, was asked whether at any time after he gave the bill of sale to plaintiff he had been up to the property or exercised any acts of ownership over it. [1] An objection by defendant was sustained, and error is predicated on the ruling. Appellant is not in a position to insist upon the specification: First, because he did not make any offer of proof and the answer which the witness would have given is not apparent (*Frederick v. Hale*, 42 Mont. 153, 112 Pac.

70; *Forquer v. North*, 42 Mont. 272, 112 Pac. 439; *Bean v. Missoula Lumber Co.*, 40 Mont. 31, 104 Pac. 869; *Tague v. John Caplice Co.*, 28 Mont. 51, 72 Pac. 297); and, second, without objection the witness was afterward permitted to say, "I have not been up to Strater to that shearing plant since the execution of the bill of sale." Error in the exclusion of offered testimony [2] is cured by the subsequent admission of substantially the same evidence. (*Frederick v. Hale*, above; *State v. Van*, 44 Mont. 374, 120 Pac. 479.)

2. Plaintiff offered to prove that the bill of sale which he received from Buffington for this property was filed with the county clerk and recorder of Valley county, and that on or about July 30, 1910, he made application to an agent of an insurance company for insurance upon the property in his own name. Each of these offers was properly refused. If plaintiff had been permitted to prove the facts, he would not have been any better off. They would not have constituted, nor would they have assisted in constituting, the acts performed by plaintiff and Buffington a delivery of the possession of the property in controversy. At best they would have reflected only [3] upon the good faith of the parties to the sale, and that question is not open to investigation in an action wherein the sale is attacked solely on the ground of fraud in law, under section 6128, Revised Codes. (*Morris v. McLaughlin*, 25 Mont. 151, 64 Pac. 219.) Section 6130 takes this transaction out of the category of those subject to explanation upon the theory of good faith and fair dealing. In *Gehlert v. Quinn*, 35 Mont. 451, 119 Am. St. Rep. 864, 90 Pac. 168, the transaction in question was attacked on the ground of fraud in fact, as well as fraud in law, and therefore the question of good faith was involved, and the admission in evidence of the fact that the bill of sale from the seller to the buyer had been filed for record was proper.

3. Is the evidence sufficient to make out a *prima facie* case in favor of plaintiff? The controversy rages around the application of the rule of law stated in section 6128, above, which, so far as applicable to this case, reads as follows: "Every transfer of personal property \* \* \* is conclusively presumed, if

made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession."

It is conceded that Buffington was the owner and in possession of the property until about the last of July, 1910; that he was indebted to the defendant company at that time and for several months thereafter; that defendant commenced an action against him on August 8, 1910, attached this property on August 11, and purchased it later at sheriff's sale upon execution in the same action. The only question for determination now is: Was there such a delivery of possession by Buffington to Taylor prior to August 11, 1910, followed by an actual and continued change of possession of the property, as to satisfy the demands of section 6128 above? Much of the record is given up to evidence which is wholly irrelevant to the issue made by the pleadings. There was not any attack upon the sale from Buffington to Taylor for fraud in fact. Assuming, as we do, that there was a sale as claimed by plaintiff, still evidence of the consideration [4] paid for the property by Taylor, or evidence of the good faith of the parties to the sale, or evidence of any or all of those facts and circumstances which are usually emphasized in actions where actual fraud is charged, was entirely irrelevant. (*Morris v. McLaughlin*, above.) Viewing the relevant evidence—and there is very little of it—in the light most favorable to the plaintiff, and assuming that it proves every fact which it tends to prove, and we are confronted with this situation: The property, a sheep-shearing plant at Strater, consists of a frame building used as a cookhouse; another frame building used as the shearing-house, in which was the shearing machinery—shafting, belts, pulleys, *etc.*—some scales, a gasoline engine, corrals, panels, *etc.* Sometime about the last of July, Buffington, who then owned and was in possession of this property, sold it to Taylor. Three witnesses only were examined. E. L. Wallace, cashier of the bank at Saco, testified to the conversation which

he heard between Buffington and Taylor which resulted in the sale, and to the directions given by Taylor to Buffington to go up to the plant and "see that everything is put in order and locked up." He testified to other facts and circumstances which are not material to this inquiry, but he did not testify to anything further done by Buffington or Taylor looking to a delivery of the property or to a change of its possession. Taylor, the plaintiff, testified to the conversation had with Buffington about the end of July, 1910, which terminated in a sale of the shearing plant by Buffington to him. He gave much immaterial evidence as to the business transactions between him and Buffington prior to the time of the sale and the elements which entered into the consideration for this property. He testified that after their negotiations were concluded he directed Buffington to pile up the panels so that he could get insurance on the property, and that afterward in passing on the train he observed that the panels had been piled. He testified that on August 9 he and Buffington went to Glasgow and there had a bill of sale of the property drawn and executed. He testified further: "I never went down there at any time for the purpose of assuming possession of the property. Q. After your agreement with Mr. Buffington you never pretended in any way to assume any control over the property, did you; just left it there as he had piled it up, and that is all you know about it, isn't it? A. Yes, sir. (Redirect examination.) Q. State whether or not it was practicable to move that property. A. No, it wouldn't be. I gave Mr. Buffington directions what to do with the keys to that property when he had stored the machinery and piled up the panels. I ordered him just to leave them there at the Mercantile store." This is all the evidence given by the plaintiff which tends to disclose the acts of the parties with respect to the delivery or change of possession of the property. Buffington testified to the verbal negotiations which resulted in the sale of this property to Taylor; that according to Taylor's directions he, with other men in his employ, took down the shearing machinery, hauled it over to the cookhouse, stored it, locked that house, and sent the keys to the Saco Mercantile Company's office for Mr. Taylor;

that he never saw the keys afterward and never was up to the plant after the day upon which the bill of sale was executed. On cross-examination, however, this witness qualified his testimony to the extent of saying that he was not the last one at the plant when the machinery was stored; that other men were left there; that he instructed them to lock up the cookhouse; that afterward the keys were brought to him; and that he gave them to Burton or McKinney to take to the Saco Mercantile Company.

Does this evidence prove or tend to prove an immediate delivery of the property by Buffington to Taylor, and an actual and continued change of possession within the meaning of section 6128? We think not. Assuming for the purposes of this appeal—as counsel for appellant do—that the character of this property is such that manual delivery was not practicable, counsel then insist that a symbolical delivery of such property may satisfy the demands of the statute, and *Western Mining Supply Co. v. Quinn*, 40 Mont. 156, 135 Am. St. Rep. 612, 20 Ann. Cas. 173, 28 L. R. A. (n. s.) 214, 105 Pac. 732, is cited to support this contention. In that case we held that the delivery by the seller to the buyer of the keys to a warehouse in which was locked heavy mining machinery, lumber, etc., was a sufficient delivery of possession of the property to satisfy the statute above. We do not know of any case where the rule of the statute has been given a more liberal construction; but the evidence in this instance falls far short of establishing any delivery at all, manual or symbolical. It does not appear that the cookhouse in which most of this property was stored was in fact locked, and, if it was—which is a mere surmise—there is not any evidence that the keys were delivered to Taylor, the purchaser. All that can be said of the evidence is that it shows that Buffington left orders with the men at the plant to lock up the machinery in the cookhouse and that thereafter he delivered the keys to Burton or McKinney to deliver to the Saco Mercantile Company. But there is not an intimation in the record that the men obeyed Buffington's orders, or that the cookhouse was actually locked, or that the keys were ever delivered to the Mercantile Company or to Taylor, the purchaser. Taylor was a witness in his own

behalf, but he failed to state that he ever received the keys or knew whether or not the property was locked up or otherwise secured. While there may be a symbolical delivery of possession of a building and its contents or the contents of a building, it is asking altogether too much to have this court declare that the provisions of section 6128, above, are met by evidence of this character.

In *Dodge v. Jones*, 7 Mont. 121, 14 Pac. 707, the horses in controversy, with others, were gathered from the public range, the purchased ones separated from the others, branded with a distinguishing brand, and then returned to the range. This court held that there was a sufficient delivery and change of possession to meet the requirements of the statute. Upon a similar state of facts a like conclusion was reached in *Cady v. Zimmerman*, 20 Mont. 225, 50 Pac. 553. But in *Dodge v. Jones* this court quoted with approval from *Stevens v. Irwin*, 15 Cal. 503, 76 Am. Dec. 500, the following: "The delivery must be made of the property; the vendee must take the actual possession; that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous—not taken to be surrendered back again—not formal, but substantial." This doctrine was repeated in *Morris v. McLaughlin*, above, decided after *Cady v. Zimmerman*, and in that case the further language of the California court in construing a statute like our 6128 was adopted: "The word 'actual' was designed to exclude the idea of a mere formal change of possession, and the word 'continued,' to exclude the idea of a mere temporary change."

The motives which prompted Buffington and Taylor in their transaction are not the subject of inquiry here. We may assume that they acted in perfect good faith, intending to accomplish a legitimate object in a lawful manner; but, because they failed to make an immediate delivery of the property and to

follow such delivery by an actual and continued change of possession, the statute declares their sale void as against the Malta Mercantile Company, a creditor of Buffington. For this reason the evidence produced fails to make out a case to go to the jury, and the trial court properly granted the nonsuit.

The judgment is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur. .

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MELZNER, ADMR., RESPONDENT, v. RAVEN COPPER CO.,  
APPELLANT.

(No. 3,254.)

(Submitted April 18, 1913. Decided May 13, 1913.)

[132 Pac. 552.]

*Master and Servant—Mines and Mining—Personal Injuries—  
Respondent Superior—Complaint—Sufficiency—Joint Tort-  
feasors—Verdict as to One—Effect—New Trial—Record—  
Insufficiency—Instructions.*

**Personal Injuries—Master and Servant—Contributory Negligence—Com-  
plaint—Sufficiency.**

1. *Held*, that the plaintiff in an action to recover damages under section 5248, Revised Codes, need not allege in his complaint that the injury sustained was caused "without contributing negligence on his part," such negligence being matter of defense to be asserted and shown by defendant employer unless made apparent by plaintiff's own pleading or proof.

**Same—Joint Tort-feasors—Verdict as to One Only—Effect.**

2. Where the verdict in an action for wrongful death brought jointly against a mine operator and a hoisting engineer under section 5248, Revised Codes, by which the former is made responsible for injuries to his employees under the maxim *respondent superior*, was silent as to the engineer, the failure of the jury to find as to him was not a finding of non-negligence on his part, but should be regarded as no finding as to him.

**Same—Appeal and Error—New Trial—Record—Insufficiency.**

3. An alleged irregularity said to have prevented appellant from having a fair trial, not shown by the record to have been called to the attention of the court, although the notice of intention to move

for a new trial specified irregularity in the proceedings as one of the grounds, will not be reviewed on appeal.

Same—Verdict Contrary to Law—Review—Record—Insufficiency.

4. A verdict is contrary to law when the condition of the evidence is such that the jury may not find otherwise than in accordance with the instructions, and yet have ventured to do so.

Instructions—When Properly Refused.

5. An instruction unsupported by the pleadings or evidence, as well as contrary to the theory on which the party offering it tried the case, may properly be refused.

Same—Refusal—Review—Record—Insufficiency.

6. Where the record, though giving the settlement of certain instructions, failed to set out the instructions as read to the jury, refusal to give one offered by appellant will not be reviewed.

Personal Injuries—Contributory Negligence—Instructions—Proper Refusal.

7. Where neither the complaint nor the evidence of plaintiff in an action for negligent death was such as to raise the presumption of contributory negligence on the part of decedent, no burden of showing freedom therefrom rested on plaintiff; therefore an instruction placing such burden upon him was properly refused.

*Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.*

ACTION by A. B. Melzner, administrator of the estate of J. W. Martin, deceased, against the Raven Copper Company. From a judgment for plaintiff, and an order denying it a new trial, defendant appeals. Affirmed.

*Messrs. Kremer, Sanders & Kremer, and Mr. J. A. Poore, for Appellant, submitted a brief; Mr. Poore argued the cause orally.*

Under section 6711, Revised Codes, a verdict may be returned against one only of several defendants, but it must be in favor of the other defendants. A verdict in any other form is fatally defective and cannot stand, and it will not do to say that because the verdict in this case is against the Raven Copper Company alone, the other defendant must have been negligent. Such a contention ignores the plain meaning and construction given section 6711, requiring the verdict to be for or against each defendant. There is a mistrial, requiring a new trial, where there is a verdict for plaintiff against one defendant only, and no verdict for or against the other defendant. (*McMahon v. Hetch-Hetchy etc. R. Co.*, 2 Cal. App. 400, 84 Pac. 350.) The entry of a judgment which does not dispose of all of the de-



fendants is reversible error, and a dismissal as to the other defendants not included in the judgment after the judgment has been entered could not cure the defect in the judgment. (*Ward v. Stanley*, 41 Ill. App. 417.)

The ordinary rule that among tort-feasors there is no contribution does not apply here, for there is no allegation that the Raven Copper Company was delinquent in any respect or violated any of its primary duties toward Martin. The sole act for which it is alleged it should respond in damages is the negligence of the hoisting engineer. Thus, it appears that this action does not fall within those where there are joint tort-feasors charged with negligence. If the engineer was not negligent, the company is absolved. If the engineer was negligent, and such negligence was properly made to appear by the verdict of the jury, then the company is responsible, no matter how completely it complied with its common-law obligations owing the deceased. But, inasmuch as the only possible negligence alleged was that of the hoisting engineer, if the appellant is compelled to pay the judgment entered in this case, it should have the right to proceed against McPherson to compel him to reimburse it for the damages it has sustained by reason of his sole negligence and which it has been compelled to pay. But a verdict like the one returned which is absolutely silent as to McPherson is a finding in his favor (*Westfield G. & M. Co. v. Abernathy*, 8 Ind. App. 73, 35 N. E. 399; *Kinkler v. Junica*, 84 Tex. 116, 19 S. W. 359; *Gulf etc. v. James*, 73 Tex. 12, 15 Am. St. Rep. 743, 10 S. W. 744; *Lawson v. Robinson*, 68 Kan. 737, 75 Pac. 1012; *Howard v. Johnson*, 91 Ga. 319, 18 S. E. 132; 22 Ency. of Pl. & Pr., 905, 959; 26 Am. & Eng. Ency. of Law, p. 1024, 1034), and the copper company is prejudiced and deprived of a right it undoubtedly ought to have preserved to it if the present judgment stands. (*Portland Gold Min. Co. v. Stratton's Independence*, 158 Fed. 63, 85 C. C. A. 393; *Bradley v. Rosenthal*, 154 Cal. 420, 129 Am. St. Rep. 171, 97 Pac. 875; *Indiana N. & T. Co. v. Lippincott Glass Co.*, 165 Ind. 361, 75 N. E. 649; *Doremus v. Root*, 23 Wash. 710, 54 L. R. A. 649, 63 Pac. 572; 26 Cyc. 1545 (c).)

The case of *Verlinda v. Stone & Webster Engineering Corp.*, 44 Mont. 223, 119 Pac. 573, is clearly distinguishable. The rule announced in that case is a logical and proper one in cases involving joint tort-feasors, for a defendant tort-feasor found guilty of negligence ought to bear the consequence of his neglect. But in the case at bar such a rule absolutely prevents the defendant, not a tort-feasor, but rendered liable by law to pay for the damages done by the servant who was solely the cause of the injuries, from recovering from the servant, whose neglect the defendant has to pay for, the pecuniary damages it has sustained by satisfying the judgment. In such a case, the rule finds no application, and to enforce it is to deprive the non-negligent defendant of a right of reimbursement which the law affords. (See, also, *O'Brien v. American Casualty Co.*, 58 Wash. 477, 109 Pac. 52; *Schweickhardt v. City of St. Louis*, 2 Mo. App. 571.) "A judgment on the merits against a master, in an action of trespass, for the act of his servant, is a bar to an action against the servant for the same act, though such judgment was not rendered till after general issue pleaded to the action against the servant." (*Emery v. Fowler*, 39 Me. 326, 63 Am. Dec. 627; *Ivanhoe Furnace Corp. v. Crowder*, 110 Va. 387, 66 S. E. 63; *Hayes v. Chicago Tel. Co.*, 218 Ill. 414, 2 L. R. A. (n. s.) 764, 75 N. E. 1003; *McGinnis v. Chicago, R. I. & P. Ry. Co.*, 200 Mo. 347, 118 Am. St. Rep. 661, 9 Ann. Cas. 656, 9 L. R. A. (n. s.) 880; *Stevick v. Northern Pac. Ry. Co.*, 39 Wash. 501, 81 Pac. 999; *Sipes v. Puget Sound E. Ry.*, 54 Wash. 47, 102 Pac. 1057; *Morris v. Northwestern Imp. Co.*, 53 Wash. 451, 102 Pac. 402.)

This is purely a statutory action, and the plaintiff must bring himself clearly within the statute in order to state a cause of action. (*New Bedford, City of, v. Inhabitants of Hingham*, 117 Mass. 445; *Haskins v. Alcott*, 13 Ohio St. 210; 36 Cyc. 1237.) We recognize the rule that in a common-law action contributory negligence is a matter of defense, but when plaintiff relies upon a particular statute which expressly contains as an essential ingredient the provision that he must be free from contributing negligence, it then becomes a condition precedent to his right to recover to allege and prove this condition. It is also a well-

recognized principle of law that when an exception is a constituent part of a statute, it must be negated by the pleader,—it no longer becomes a matter of defense, but is affirmative matter to be alleged in the complaint and proved before the party relying upon the statute is entitled to recover. (*Barksdale v. City of Laurens*, 58 S. C. 413, 36 S. E. 661; *Shea v. Boston & Maine R. Co.*, 154 Mass. 31, 27 N. E. 672; *Cleveland etc. R. Co. v. Bossert*, 44 Ind. App. 245, 87 N. E. 158; *Cleveland Ry. Co. v. Foland* (Ind. App.), 88 N. E. 787; *Indianapolis etc. Transit Co. v. Foreman*, 162 Ind. 85, 102 Am. St. Rep. 185, 69 N. E. 669; *Southern R. Co. v. Salmon*, 132 Ga. 753, 65 S. E. 70; *Cole v. Mayne*, 122 Fed. 836.)

*Messrs. Maury, Templeman & Davies*, and *Messrs. Davies & Lyons*, for Respondent, submitted a brief; *Mr. H. L. Maury* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The respondent prosecutes this action as administrator of the estate of J. W. Martin, who died on March 11, 1910, leaving a widow and two children. The complaint, which is against appellant Raven Copper Company and Malcolm McPherson as defendants, details the cause and manner of Martin's death as follows: He was foreman in the Raven mine, which was being operated by appellant through a shaft, by means of certain hoisting apparatus, including an engine, cable and skip, in charge of Malcolm McPherson as hoisting engineer; while in the performance of his duties as foreman and "on the said 11th day of March, 1911, when the said skip was at rest in said shaft at about the 1,140 station of said shaft, \* \* \* the said J. W. Martin, who had just prior to the time the said skip came to a rest at said station been riding upon the same, attempted to get off the said skip at said station, and while attempting to get off of said skip, and yet not being off the same, the said defendant hoisting engineer Malcolm McPherson, carelessly and negligently, without any signal so to do, raised said skip and negligently caught said J. W. Martin between the said skip and

the said shaft timbers at said station, and so grievously injured him that he died a few minutes thereafter." To this complaint the defendants interposed separate general demurrers, which were overruled; whereupon they separately answered. The answers, which are identical in substance, deny the facts pleaded in the complaint on which negligence is charged, and as affirmative defenses they plead: (a) That the injuries and death of Martin were due to his own sole negligence in that while the skip was ascending in accordance with his signals, he, without signaling the engineer to stop the skip and without any knowledge on the part of the engineer, and without any necessity for so doing, voluntarily attempted to get off said skip while it was in motion, at a point where said skip did not usually or at all stop, and in so doing was caught between the ascending skip and timbers; and (b) that the danger of attempting to leave said skip while the same was in motion was obvious and was, or should have been, known to and appreciated by Martin.

The affirmative pleas in the answer were denied by the reply, and the cause in due time came on for trial before the court sitting with a jury. It is quite clear from the pleadings that the determinative issues were whether the skip was in motion or at rest when Martin started to get off; and, if it had stopped and moved again without a signal, whether these events were due to the negligent act or omission of the engineer. The testimony of John Koskinen, an eye-witness to the accident, is distinct and positive that the skip had stopped and was at rest three feet below the proper spot when Martin was getting off and that it moved upward without a signal, catching Martin between the skip and the timbers. Equally distinct and positive was the testimony of the engineer and two other persons that he did not stop the engine by which the movements of the skip were controlled until the proper mark was reached, nor start it again without a signal. There was evidence also to the effect that if the skip did stop before it reached the proper spot it may have been due to the elasticity of the cable in connection with the variations in the descent of the shaft. The value of all this was for the jury; and the verdict was against the appellant Raven

Copper Company, without mention of McPherson. Judgment was entered accordingly. Thereafter both defendants joined in a motion for new trial, which was denied. This appeal is by the company alone from the judgment and from the order overruling the motion for new trial.

1. The appellant insists that the complaint does not state facts [1] sufficient to constitute a cause of action, in that "it fails to allege one other essential fact—that the injury was caused without contributing negligence on the part of John Martin." This it is argued was necessary, not because the complaint alleges an affirmative act of the deceased as a proximate cause of his injury, but for these reasons: That this is a purely statutory action, based upon section 5248, Revised Codes, and the plaintiff, to state a cause of action under it, must plead himself clearly within its provisions; that in this section, which makes the mine owner liable for any damage sustained by an employee without contributing negligence on his part, when such damage is caused by the negligence of a hoisting engineer, the phrase "without contributing negligence on his part" constitutes an exception from which the pleader must exclude himself. We think the position untenable. This action is not a "purely statutory action," in the sense in which counsel apparently use that term. In two decisions of this court it was held that the purpose and effect of section 5248 are to classify the employees in mines, mills, and smelters by declaring who among them are vice-principals, to make the employer answerable in certain cases under the maxim of *respondeat superior*, and in such cases to take away a defense which had been available before the passage of the statute. (*Thurman v. Pittsburg & Mont. Copper Co.*, 41 Mont. 141, 150, 108 Pac. 588; *Beeler v. Butte & London C. Dev. Co.*, 41 Mont. 465, 475, 110 Pac. 528.) Doubtless, as regards this purpose, the pleader must bring himself within the statute, and he may not recover by virtue of it upon a complaint which discloses no basis for *respondeat superior*, but grounds itself wholly upon a breach of primary duty on the part of the master. (*Thurman v. Pittsburg & Mont. Copper Co.*, *supra*; *Kelly v. Northern Pac. Ry. Co.*, 35 Mont. 243, 88 Pac. 1009.)

But this is to prevent variance and surprise, to enable the defendant to make such defenses as may be appropriate, and falls far short of saying that the statute creates a cause of action or that other situations recognized by the general law as affirmative defenses are in anywise affected. To our minds, the phrase "without contributing negligence on his part" is a mere proviso or qualifying clause, inserted to forestall any possible interpretation of the statute as also abolishing the defense of contributory negligence. And this finds support in the consideration of the title and purview of the original enactment. So far as this clause is concerned it is as if the statute read: "Every person operating a mine shall be liable for any damage sustained by any employee thereof within this state, when such damage is caused by the negligence of a hoisting engineer, etc., unless the employee was himself guilty of contributory negligence." Such a proviso need not be negated in the complaint. (*Lorimer v. St. Paul City Ry. Co.*, 48 Minn. 391, 51 N. W. 125; *Rowell v. Jamrin*, 151 N. Y. 60, 45 N. E. 398; *Columbus & W. Ry. Co. v. Bradford*, 86 Ala. 574, 6 South. 90; *Acker et al. v. Richards*, 63 App. Div. 305, 71 N. Y. Supp. 929; *Territory v. Burns*, 6 Mont. 72, 9 Pac. 432; *State v. Stapp*, 29 Iowa, 551; 36 Cyc. 1238; Bliss on Code Pleading, sec. 202; Phillips on Code Pleading, sec. 239.) By the statute the rule that the mine owner shall not be liable for injury to any employee due to the negligence of a fellow-servant is changed, but the rule that the employer shall not be liable if the employee was guilty of contributory negligence is unchanged. Now, as before the passage of the Act, if the employee was guilty of contributory negligence, that is a defensive fact to be asserted and shown by the defending employer, unless it appear from plaintiff's own pleading or proof.

2. The next serious contention is that the verdict of the jury, [2] being silent as to McPherson, amounts to a finding that he was not guilty of negligence; that inasmuch as the action is predicated solely upon his alleged negligence, the company being held only under *respondeat superior*, no judgment can properly go against it if he was not guilty as charged. Granting the pre-

mise, there may be some force in the conclusion. The subject, however, is not an open one in this state. In *Verlinda v. Stone & Webster Engineering Corp.*, 44 Mont. 223, 119 Pac. 573, this court, discussing a similar verdict, said: "The conclusions reached by jurors are sometimes inexplicable. Often they arbitrarily find against one party and in favor of another without any apparent reason; but, if the evidence justifies the verdict as to the party held, there is no reason why it should not be deemed good as to him, notwithstanding there is no finding as to the other. \* \* \* The failure of the jury to find as to Wallace should be regarded as no finding upon the issues as to him at all." So, here, McPherson has not been acquitted of negligence, but the case as to him stands as though it had not been tried. This being true, it also follows that the failure of the jury to find as to McPherson cannot be seriously considered in the light of an irregularity in the proceedings by which the Raven Company was prevented from having a fair trial. Even if it was an irregularity in the sense of the statute on new trials, we do not see how the company was prejudiced by it; the company still has whatever right of action it ever had against McPherson. It never did have any absolute right to his presence as a defendant in this particular case. That was optional with the plaintiff. Had McPherson not been joined in the first instance, the cause would have proceeded without him, its merits would have been exactly the same, it would have been supported by substantially the same evidence, and the fairness of the trial, wherever had, would have been entirely unaffected. How, then, is it affected by the circumstance that no adjudication was made as to McPherson, who, though made a party, was not a necessary one? But if the failure of the jury to find as to Mc-  
[3] Pherson was an irregularity by which the company was prevented from having a fair trial, we cannot consider it here, for the reason that, although the notice of intention to move for a new trial specifies irregularity in the proceedings in general terms, the record does not disclose that any complaint, objection, exception, or mention was ever made to the trial court of the

particular matter relied on. It would be a manifest impropriety to review a matter of this kind on such a record.

3. Among other instructions the court gave the jury the following: "19a. \* \* \* It is incumbent upon the plaintiff to prove by a preponderance of the evidence, before the plaintiff can recover in this action, that the hoisting engineer, in the exercise of ordinary care, knew or should have known that the deceased intended to get off or would be likely to get off said skip at the place at which he was injured." And: "21a. \* \* \* If from all of the evidence in this case you find that the deceased ordered the hoisting engineer to hoist him on the skip from the 1,300-foot level of the Raven shaft to the place described in the evidence as 'the 1,140,' and the hoisting engineer, as a reasonably careful person did not know or should not have anticipated that the deceased would attempt to get off of said skip before it reached the place in said shaft designated as the '1,140,' plaintiff cannot recover and your verdict will be in favor of the defendant." It is now urged that the verdict is contrary to these instructions and therefore against law, because the hoisting engineer testified that Martin just before going into the shaft said: "I am going to the 1,300 and I will send up the skip and possibly three skips of water and come up to the 1,140 and pick up John (Koskinen) and take him to the 400," without expressing any intention to get off or indicating that he had any duties to perform at the 1,140, other than to pick up John. "A verdict is contrary to the law when the condition of the [4] evidence is such that the jury may not find otherwise than in accordance with the theory of the instructions, and yet have ventured to do so." (*Previsich v. Butte El. Ry. Co.*, ante, p. 170, 131 Pac. 25, 28.) We do not think the verdict is without support in the evidence under the instructions quoted. They were given at the instance of the defendants, and, without discussing their correctness either in the abstract or with relation to the theory of the case as tried by the defendants, we content ourselves with observing that they are predicated on the idea that the accident was due to some act or omission of the engineer which would have been negligence if he knew, or should have



known, that Martin might get off, but which was not negligence in the absence of such knowledge, actual or imputed. As shown by the evidence, it was the duty of the engineer not to move the skip after it had stopped with a man on board, without a signal; that he knew this is obvious from his own testimony; he knew, or should have known, that Martin, as foreman, had the same knowledge and might rely upon it; he knew that the 1,140 was not a level or station, properly so called, but a mere water-loading point; he had been in the shaft and presumably knew that the 1,140 was not lighted; he knew that Martin was on the skip because the signal complied with the prearrangement; he knew, or should have known, that Martin, as foreman, might find it necessary or advisable to get off at the 1,140 or at any other place in the mine to which he might order himself taken; and he knew that a man was to be picked up at the 1,140. Martin had not said he would not get off, and since the skip, once it had stopped, could not again properly proceed without a signal, there was no reason why he should not get off if he supposed himself to be at the point to which he had ordered himself taken or if other occasion required. It was the duty of the engineer to realize this and to so handle the skip that Martin might get off, or that Koskinen might get on, with safety. If he did not do this, the effect of his negligence cannot be avoided upon the ground that he had no reason to anticipate that Martin might get off.

4. Complaint is made of the court's refusal to give defendants' offered instructions Nos. 28a, 10a, 24a and X. We see no error here. One of the postulates of 28a is that it was the customary method of McPherson in raising the skip to the 1,140 to stop it at a point below the proper spot in order to steady it. This proposition has no support in the pleadings, is outside the evidence, and is directly contrary to the theory on which defendants tried the case, *viz.*, that the skip did not stop below the proper spot, or, if it did, its stopping was not due to any act or omission of the engineer.

As to 10a, it was the defendants' theory that if the skip did stop below the proper spot as claimed by plaintiff, it was due

to the elasticity of the cable and to the sinuosity of the shaft causing the cable to waive, flap or jerk, which in turn caused the loaded skip to halt and momentarily stop when slowly approaching the station. They say they were entitled to have this theory presented to the jury as a reasonable explanation of the premature stop, if there was one, and that instruction 10a was designed for that purpose. We cannot perceive the design, but we do perceive a confusion of unrelated ideas which might have misled the jury had the instruction been given. Moreover, the record, while it gives the settlement of certain instructions, [6] does not anywhere set out the instructions as read to the jury; so that we do not know but what the jury may have been told everything that counsel now say was intended by offered instruction 10a.

The refusal of offered instruction 24a was proper, because neither the complaint nor the plaintiff's evidence was such as to raise the presumption of negligence or of contributory negligence. Hence no burden of exculpation was cast upon him. [7] Aided by the presumption that the deceased was exercising due care for his own safety and by the evidence that the skip had stopped when he attempted to get off, the most that can be said is that the whole case presents an issue upon the question of negligence. We may add that contributory negligence was not really an issue in the case.

Offered instruction X was a flat direction to find for the defendants. The alleged error in refusing this is submitted by counsel "under our discussion upon the question as to the verdict being contrary to instructions 19a and 21a and the failure of plaintiff to present sufficient competent proof of the negligence to the jury; furthermore, we discuss elsewhere in this brief the insufficiency of the complaint and refer thereto as a part of our argument under this error." The giving of instruction X would not have been justified by any of the considerations suggested.

5. The only remaining errors assigned are those numbered 1, 7, and 8. No. 1 relates to a question asked on cross-examination of the witness, Donald Martin. Whether the question was proper or not, the incident was too trivial to assign as ground for

reversal. If it is any satisfaction to counsel, we express the opinion that the witness took excellent care of the question and that no harm apparently was done.

Concerning assignments 7 and 8 counsel for appellant say: "For the reasons hereinbefore presented it necessarily follows that in overruling the motion for a new trial and in entering judgment the court erred." We have canvassed all the reasons presented and cannot see that any of them would justify a reversal.

The judgment and order appealed from are therefore affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE HOLLOWAY did not hear the argument and takes no part in the foregoing decision.

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BAILEY, APPELLANT, v. EDWARDS, RESPONDENT.

(No. 3,227.)

(Submitted February 14, 1913. Decided March 27, 1913.)

[134 Pac. 670.]

*Mandamus—Damages Recoverable—Judgment—Res Adjudicata*  
*—Police Officers—Wrongful Discharge—Action for Damages*  
*—Nonsuit—When Proper.*

*Mandamus—Judgment—Res Adjudicata.*

1. *Mandamus*, though a remedy civil in its nature, is not a civil action in the sense that the parties to such a proceeding and their privies are, on principles of *res adjudicata*, barred by the judgment from thereafter maintaining an action for damages flowing from the wrong which gave rise to the proceeding in *mandamus*.

Same—*Damages Recoverable.*

2. The damages allowable under section 7224, Revised Codes, in a *mandamus* proceeding are such as are incidental to the proceeding itself, and not those arising out of the transaction which the writ was invoked to redress.

Same—*Police Officers—Wrongful Discharge—Action for Damages.*

3. *Held*, under the rule announced in paragraph 1, *supra*, that a police officer who had successfully prosecuted a *mandamus* proceeding

for reinstatement to office from which he had been unlawfully removed, was not barred, by reason of such judgment, from thereafter maintaining an action against the mayor personally to recover damages measured by the salary which plaintiff would have earned but for such exclusion from office.

**Police Officers—Wrongful Discharge—Action for Damages—Nonsuit, When Proper.**

4. Plaintiff, in an action against the mayor of a city personally, charged that he had been damaged by the loss of his salary in consequence of his dismissal and subsequent preclusion from the police force, contrary, to the provisions of the Metropolitan Police Law. His evidence showed that upon his restoration to office, about eighteen months thereafter, he presented his claim for accrued salary, which was rejected for some reason not made apparent, but did not disclose that the city, though liable for his salary during the entire period of unlawful preclusion, could not be made to respond. *Held*, that an order of nonsuit was proper, no causal connection between the unlawful preclusion and loss of emoluments being made to appear.

*Appeal from District Court, Lewis and Clark County; E. K. Cheadle, Judge of the Tenth Judicial District, presiding.*

**ACTION** by Leonard Bailey against Frank J. Edwards. From a judgment of nonsuit, plaintiff appeals. **Affirmed.**

*Mr. Wm. T. Pigott, and Mr. Massena Bullard, for Appellant, submitted a brief; Mr. Pigott argued the cause orally.*

Defendant is bound by the judgments in the *mandamus* proceedings. The judgments in those cases preclude and estop him from denying the truth of the facts established, or which might have been established, therein and from questioning the law as there declared. Those judgments are final and conclusive in this action as to all the issues which were actually determined and as to all matters which might have been litigated as part of the subject in controversy in the former actions. (*Everill v. Swan*, 20 Utah, 56, 57 Pac. 716; *Walsh v. Raymond*, 58 Conn. 251, 18 Am. St. Rep. 264, 20 Atl. 464; *McIntosh v. Pittsburgh*, 112 Fed. 705; *Chisolm v. Caines*, 121 Fed. 401; *Ashton v. Rochester*, 133 N. Y. 187, 28 Am. St. Rep. 619, 30 N. E. 965, 31 N. E. 334; *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65; 23 Cyc. 1245; 26 Cyc. 486.) A proceeding in *mandamus* is a personal action. It lies to compel the performance of a personal duty. (*State ex rel. Stranahan v. Board of State*

*Canvassers*, 32 Mont. 13, 4 Ann. Cas. 73, 79 Pac. 402.) Plaintiff pleaded the former proceedings and judgments as estoppels against defendant. Defendant himself pleaded those proceedings and judgments, and the issues and evidence therein, and asked the court to consider them. He relied upon them as *res judicata* as to damages. Plaintiff's plea was by way of estoppel by *res judicata* as to certain issues of fact and law.

The defendant is liable in damages. It matters not whether he was actuated by personal ill-will or malice, or was moved by the purest motives, in unlawfully discharging plaintiff and his assignors and preventing them from serving as policemen. Defendant's duty with respect to them was merely ministerial and executive, free from discretionary power. If, however, there was express malice, exemplary damages could be recovered. The only case we have discovered in which actual malice was deemed a necessary ingredient in a cause of action against such an officer as defendant for the unlawful dismissal of policemen is *Burch v. Hardwicke*, 30 Gratt. (Va.) 24, 32 Am. Rep. 640, and there the court held that it would assume malice because the defendant successfully objected to the plaintiff's offer to prove malice. In the present action, the proofs established either that defendant was prompted solely by personal malice or was reckless of law and of the legal rights of plaintiff and his assignors. But the element of maliciousness is only material when punitive damages are sought. The question of defendant's liability in the circumstances here existing is not an open one in Montana. (See *Smith v. Zimmer*, 45 Mont. 282, 125 Pac. 420; 29 Cyc. 1441, 1442.) "By the weight of authority, an unconstitutional law affords no protection to officers who act under it. \* \* \* " (8 Cyc. 805, 769, and cases cited.) Where the law requires absolutely a ministerial act to be done or not to be done by a public officer, and he violates that law, he must answer in damages to the person aggrieved by his misconduct or nonfeasance. "A mistake as to his duty and honest intentions will not excuse the offender." (*Amy v. Supervisors*, 11 Wall. (U. S.) 136, 20 L. Ed. 101; *Tracy v. Swartwout*, 10

Pet. (U. S.) 80, 9 L. Ed. 354; *Booth v. Lloyd*, 33 Fed. 593; *Belknap v. Schild*, 161 U. S. 10, 40 L. Ed. 590, 16 Sup. Ct. Rep. 443; *Scott v. Donald*, 165 U. S. 58, 41 L. Ed. 632, 17 Sup. Ct. Rep. 265; *Mock v. City of Santa Rosa*, 126 Cal. 330, 58 Pac. 826.) A justice of the peace is liable, in an action of tort, to a person arrested on a warrant issued under an unconstitutional statute. So are the persons who aided in the arrest, or caused a fine to be imposed. (*Kelly v. Bemis*, 4 Gray (Mass.), 83, 64 Am. Dec. 50; *Sumner v. Beeler*, 50 Ind. 341, 19 Am. Rep. 718; *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65; *Clark v. Miller*, 54 N. Y. 528; *Kinneen v. Wells*, 144 Mass. 497, 59 Am. Rep. 105, 11 N. E. 916.)

The district court held, in granting the motion for judgment in favor of defendant, that the identical matter in controversy in this action was involved in the four actions referred to in the testimony and in the judgment-rolls which were offered in evidence, being proceedings in the nature of *mandamus* proceedings, wherein the plaintiff and his assignors were reinstated on the police force of the city of Helena, wherein it was adjudged that the ordinance was invalid, and the proceedings under which the plaintiff and his assignors were dismissed were void, and the action of the mayor and city council in dismissing them was nugatory. Many of the issues were common to this action and the four proceedings in *mandamus*, but the causes of action here are not the causes of action in the proceedings. But the defendant's assertion that the *mandamus* proceedings operated as estoppels upon plaintiff to maintain this action was denied, and the district court's view in that behalf held erroneous, in *Peterson v. Butte*, 44 Mont. 401, 120 Pac. 483, and *Wynne v. Butte*, 45 Mont. 417, 123 Pac. 531.

*Messrs. Walsh & Nolan* and *Mr. Edward Horsky*, for Respondent, submitted a brief; *Mr. T. J. Walsh* argued the cause orally.

The essential particular in which the appellant's cause failed was that it appeared that he did not suffer, and could not have suffered, any damages on account of the acts charged. The

adjudications of this court have demonstrated that anything that was done was utterly nugatory,—that the appellant and his colleagues remained police officers, each entitled to his salary as the months came and went. If the city declined at the end of any month to pay its obligation to him, he could sue and recover. No harm of any kind flowed from any of the acts complained of. The case of *Hill v. Mayor of Boston*, 193 Mass. 569, 79 N. E. 825, is directly in point. (See, also, *Millican v. McNeil* (Tex. Civ. App.), 50 S. W. 428; *Jones v. Loving*, 55 Miss. 109, 30 Am. Rep. 508.) In *Butler v. Kent*, 19 Johns. (N. Y.) 223, 10 Am. Dec. 219, the very sensible rule is asserted that “an individual cannot maintain an action against an officer or other person for damages arising from a breach of duty to the public, without showing some special and peculiar injury to himself.” The case of *McHenry v. Sneer*, 56 Iowa, 649, 10 N. W. 234, is closely analogous.

The subject of *mandamus* is covered in Montana by sections 7213–7226, Revised Codes. They were taken from California, sections 1084–1097, Kerr’s Code of Civil Procedure. There are no California decisions applicable to the case at bar. Washington has the same statute as Montana in reference to the award of damages in *mandamus* proceedings. (Laws 1895, sec. 26.) The effect of a judgment in *mandamus*, as a bar to a subsequent action for damages, was directly passed upon by the supreme court of Washington in the case of *Achey v. Creech*, 21 Wash. 319, 58 Pac. 208, where it was said:

“The respondent elected to prosecute her rights in the statutory form of *mandamus*. That action was prosecuted to final judgment, and, when a party has a choice of remedies by *mandamus* or suit for damages, the adoption of one bars the right to invoke the other. (Merrill on Mandamus, par. 311; *Kendall v. Stokes*, 3 How. (U. S.) 87, 11 L. Ed. 506; *State v. Ryan*, 2 Mo. App. 303.) \* \* \* Having, then, the right to plead and recover damages in the *mandamus* proceeding, the law will presume that she demanded and received in that action all that she was entitled to, and the defendant will not be subjected to the

defense of a multiplicity of suits, when all the subjects of the controversy could be decided in one action." Idaho also has the same statute as Montana. In the case of *Hill v. Morgan, Judge*, 9 Idaho, 777, 76 Pac. 765, the court used the following language: "If judgment be given for the applicant, he may recover the damages which he has sustained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue; and a peremptory writ of mandate must also be awarded without delay." In Colorado, in *mandamus*, a judgment directing the sheriff to restore property and pay damages therein assessed was sustained. (*Bell v. Thomas*, 49 Colo. 76, 31 L. R. A. (n. s.) 664, 111 Pac. 76.) The supreme court of Washington has further construed said *mandamus* statutes and further affirmed *Achey v. Creech, supra*, in the case of *State v. Lamprey*, 57 Wash. 94, 106 Pac. 501. (See, also, 26 Cyc. 483; *Kendall v. Stokes*, 3 How. (U. S.) 87, 11 L. Ed. 506.)

MR. JUSTICE SANNER delivered the opinion of the court.

According to the complaint, the appellant, plaintiff below, and Moses Quintin, George Farnam and William F. Bossler were on June 1, 1908, members of the police force of the city of Helena; on that day the respondent "wrongfully, unlawfully, maliciously and oppressively, and under color of his pretended authority as mayor of said city, did without right or jurisdiction or authority, and contrary to the provisions of the statute in that behalf enacted," cause their dismissal and exclusion from office; and although they at all times and by all proper means protested against this exclusion and repeatedly reported for duty and tendered their services as members of the police force, they were by the act of respondent deprived of "all the insignia, badges, privileges and emoluments" of office until their restoration by judicial mandate on February 11, 1910. The personal claims of Quintin, Farnam and Bossler are alleged to have been assigned to the appellant, and he prays damages measured by



the salary of each officer during the period of deprivation, with interest.

Several questions are presented by the assignment of errors, but they are all resolvable into *one*, viz.: whether the trial court correctly granted respondent's motion for nonsuit. The order of nonsuit, to be sustained, must find support in one or the other of the following grounds: (1) That the appellant is barred and concluded from maintaining this action on principles of *res judicata*; (2) that the evidence does not show any damages suffered by plaintiff which are recoverable in this action.

1. It seems advisable to first dispose of the question presented by the pleas in the answer, to the effect that the appellant is [1] precluded from maintaining this action because he and his assignors prosecuted against the present respondent, as mayor of the city of Helena, their several *mandamus* proceedings in and through the district court of the first judicial district and to final decision by this court "for the same causes of action as are now pleaded and in which the matters now in controversy were, or might have been, determined."

It is disclosed by the reply that the fact-basis for the relief now sought is essentially the same as that for relief in the [2, 3] *mandamus* proceedings. Among the issues then presented and determined were "whether or not defendant, acting under the pretense and cover of his office as said mayor, but without authority of law and contrary to the provisions of the statute in that behalf enacted and without any right or justification so to do, on June 1, 1908, did unlawfully dismiss and discharge plaintiff from said police force and preclude him from the use or enjoyment of said place, and prevent him from performing any service or duty as a member of said force, and thereafter always prevented plaintiff from acting as such member and from discharging his duties as such, and deprived him of his badges and other insignia of his office and of his privileges as such member."

The loss of emoluments as a matter of special damage was not raised by the pleadings in the *mandamus* proceedings; but it is

quite clear that if causes of action as against Frank J. Edwards, personally, now exist in virtue of the claims of appellant and his confreres, they existed in part, if not *in toto*, at all stages of the *mandamus* proceedings against Edwards as mayor; and if these claims should have been litigated in those proceedings, then under the familiar principle, applicable in *mandamus* as elsewhere, that a judgment concludes the parties thereto and their privies as to all matters which might have been litigated as part of the subject in controversy, they cannot be litigated now.

The question is not free from perplexity. In the Chapter of our Codes relating to *mandamus*, we find provisions for a verified answer; for traversing the answer; for trial by jury of certain questions of fact; for judgment; and "if judgment be given [2] for the applicant, he may recover the damages which he has sustained, as found by the jury, \* \* \* together with costs," etc. (Rev. Codes, sec. 7224.) This section is apparently an open door to any claim of damages whatsoever arising out of the transaction which the writ of mandate is invoked to remedy; and such—the expressed conclusion of some courts—is implied in the decisions of others to be found upon the subject. (*Achey v. Creech*, 21 Wash. 319, 58 Pac. 208; *Bell v. Thomas*, 49 Colo. 76, 31 L. R. A. (n. s.) 664, 111 Pac. 76; *People ex rel. Broderick v. Morton*, 24 App. Div. 563, 49 N. Y. Supp. 760; *People ex rel. Deerell v. Musical Mut. Pro. Union*, 118 N. Y. 101, 23 N. E. 129; *Marion Beneficial Society v. Commonwealth*, 31 Pa. 82; *Hibernia Fire Engine Co. v. Commonwealth*, 93 Pa. 264; *State v. Board of Commissioners*, 11 Kan. 66; *State ex rel. Race v. Cranney*, 30 Wash. 594, 71 Pac. 50; *State ex rel. Billings v. Lamprey*, 57 Wash. 84, 106 Pac. 501; *McClure v. Scates*, 64 Kan. 282, 67 Pac. 856; *People ex rel. Van Valkenburgh v. Sage et al.*, 3 How. Pr. (N. Y.) 56.) There are several considerations, however, which convince us that this cannot be the correct interpretation of the statute. In the first place, all the decisions which seem to hold that damages for the original wrong may be recovered in the *mandamus* proceeding are either upon statutes judicially declared to follow the Statute of Anne (9th Anne, Chap. 20), or

they stand upon the theory that *mandamus* is, to all intents and purposes, a civil action. The Chapter of our Code relating to *mandamus* has been part of our written law since the territory was organized (Bannack Statutes, p. 123 *et seq.*; Codified Stats. 1872, p. 206 *et seq.*; Rev. Stats. 1879, p. 142 *et seq.*; Comp. Stats. 1887, p. 206 *et seq.*; Code Civ. Proc. 1895, sec. 1960 *et seq.*); and very early in our history it was settled that *mandamus* is not a civil action and that the Statute of Anne is not in force with us (*Chumasero v. Potts*, 2 Mont. 242, 258, *et seq.*; *Territory v. Potts*, 3 Mont. 364, 366). In *Chumasero v. Potts*, this court, touching the nature of *mandamus* said: "To call this an action or suit at law would certainly be a misnomer. \* \* \* The manner in which the term 'civil action' is used in these two sections [secs. 522, 529, Civ. Prac. Act, 1872; Rev. Codes 1907, secs. 7218, 7225] shows conclusively that our legislative assembly did not consider that the proceedings in *mandamus* were a civil action. \* \* \* The civil action has reference exclusively to private wrongs. \* \* \* What is the nature of the proceeding called *mandamus*? It is not applicable as a redress for mere private wrongs. \* \* \* It can be resorted to only in those cases where the matter in dispute, in theory, concerns the public and in which the public has an interest. \* \* \* The enforcement of the writ may incidentally, and as a result, affect private rights, but this is not the prime object of the issuance of the writ. \* \* \* The attempt to classify the proceedings in *mandamus* is always futile. It is *sui generis*. Undoubtedly it may be called an extraordinary legal remedy, civil in its nature. \* \* \* But, being a remedy to enforce public rights and not for the enforcement of private rights or the prevention or redress of private wrongs, it is not a civil action." Again, in the recent case of *State ex rel. Stuewe v. Hindson*, 44 Mont. 429, 442, 120 Pac. 485, we find the following: "This proceeding is essentially *ex relatione*. While Stuewe is nominally the complaining party, the taxpayers of Lewis & Clark county constitute the real party in interest; and if it can be said that from the allegations contained in the affi-

davit and the alternative writ the taxpayers of the county are entitled to relief of any character, which can be granted in this proceeding, it is the duty of the courts to extend that relief, whether this relator individually desires it, or the attorney general opposes it. In our determination, we are not bound by the prayer of the relator, but may search the affidavit, and order such relief as the facts stated may warrant; for the relief is granted, not to Stuewe individually, but to the public, the real party in interest." Inferences, therefore, founded upon the Statute of Anne or upon the hypothesis that *mandamus* is a civil action, can have no validity to require such a construction of section 7224, Revised Codes, as respondent here seeks to evoke.

And this conclusion finds collateral support in the further fact that in a *mandamus* proceeding a jury is not a matter of right but of discretion. Any and all of the questions arising therein, whether of law or of fact, may be tried by the court without a jury, with or without a reference (sec. 7219, Rev. Codes; *Chumaseo v. Potts*, *supra*). If the relator must litigate therein any private right to damages which he may have against the respondent personally, arising out of the wrong to which the mandate itself is directed, perforce the adversary must submit; so that a cause of action at law becomes summarily justiciable without a jury, notwithstanding the fact that as to such causes of action both parties are entitled to a jury and cannot be compelled to submit to a summary adjudication. (U. S. Const., 7th Amendment; *Basey v. Gallagher*, 20 Wall. (U. S.) 670, 22 L. Ed. 452, 1 Morr. Min. Rep. 683; Const. Mont., Art. III, sec. 23; *Chessman v. Hale*, 31 Mont. 577, 581 *et seq.*, 3 Ann. Cas. 1038, 68 L. R. A. 410, 79 Pac. 254.) But the statute clears itself of any such absurdity. It says, the applicant, if he prevail, may have "the damages he has sustained" as found by the jury, *etc.* Sustained by what? Surely, by those circumstances upon which a jury may, but need not be, called to pronounce. These are questions of fact raised by the answer, "essential to the determination of the motion and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of

which the application for the writ is based." (Sec. 7219.) How is the question of what damages the applicant may have suffered from official inaction essential to the determination of whether the writ shall go to compel official action? Or how is the question of what damages the applicant may have sustained by reason of preclusion from office essential to determine whether he shall be restored? It seems to be the rule even under the civil action theory of *mandamus* that damages cannot be awarded unless the peremptory writ is issued (*Brown v. Worthen*, 63 Kan. 883, 65 Pac. 255); and it is settled in this state that the peremptory writ cannot issue after the term of the officer involved has expired (*State ex rel. Stranahan v. Board*, 32 Mont. 13, 4 Ann. Cas. 73, 79 Pac. 402); what, in such a case, becomes of the relator's right to damages for the original wrong if they are necessarily triable in the *mandamus* proceedings?

The foregoing, and other considerations, as we think, justify our opinion that section 7224 is not to be interpreted as con-[3] tended by the respondent; but rather that the damages therein provided to be allowed in *mandamus* proceedings are such damages as are incidental to the proceedings themselves, and not those arising out of the prior preclusion or deprivation which the writ itself was invoked in part to redress. This brings us within, not the letter, but the spirit of the decision in *Peterson v. City of Butte*, 44 Mont. 401, Ann. Cas. 1913B, 538, 120 Pac. 483, and to our final conclusion upon this branch of the case: That the plaintiff is not precluded from maintaining this action by the litigation of the *mandamus* proceedings referred to in the answer.

2. We are constrained, however, to agree with the contention of respondent that the evidence presented to the trial court was [4] insufficient to sustain the action as laid. The complaint alleges "that by, through and because of the hereinbefore stated unlawful, wrongful, oppressive and malicious acts and conduct of said defendant, plaintiff has been and still is deprived of said emoluments and compensation," to his damage, *etc.* The "unlawful, wrongful, oppressive and malicious acts and con-

duct" above referred to are the dismissal and preclusion of the plaintiff and his associates from their offices as policemen. No other damages are claimed, no other cause of damage is alleged; so that the burden of the charge is that the plaintiff and his associates were damaged by the loss of their salary in consequence of their unlawful dismissal and preclusion, and not otherwise. What causal connection there was between their dismissal and preclusion on the one hand, and the loss of salary on the other, is not further revealed.

At the close of appellant's case the state of the proof as regards any causal connection between the respondent's acts and the damages claimed was this: Bailey and his associates had been kept out of their offices from June 1, 1908, to February 10, 1910, as the result of orders of the respondent under an ordinance judicially held to be void; during that time they drew no pay; upon their restoration they presented, in due form, to the mayor and city council their verified claims for the accrued salary, and these claims, for some reason, not made to appear, were rejected. There was an offer of proof that the city had exceeded the constitutional limit of indebtedness, but this was rejected, and properly so, for lack of an allegation in the pleadings.

The various decisions of this court relative to the status of the plaintiff and his associates establish that their dismissal and preclusion from office were without legal effect. (*State ex rel. Quintin v. Edwards*, 38 Mont. 250, 99 Pac. 940; *State ex rel. Quintin v. Edwards*, 40 Mont. 287, 20 Ann. Cas. 239, 106 Pac. 695; *State ex rel. Bailey v. Edwards*, 40 Mont. 313, 106 Pac. 703; *State ex rel. Edwards v. District Court*, 41 Mont. 369, 109 Pac. 434.) In contemplation of law, therefore, they were never dismissed, but were, during the entire period of their unlawful preclusion, police officers of the city, entitled to be paid as such, and, upon making good their claim to the office, in position to assert their right as against the city to the salary accrued. (*Peterson v. City of Butte*, 44 Mont. 401, Ann. Cas. 1913B, 538, 120 Pac. 483; *Wynne v. City of Butte*, 45 Mont. 417, 123 Pac. 531.)

So far as we can tell, the failure of appellant and his associates to receive their pay may have been due to circumstances wholly unconnected with the acts of respondent complained of; for there is absolutely nothing before us to show that the city could not have been made to respond or that it cannot now be made to respond; and if it should be made to respond, no emoluments will have been lost and therefore no damages suffered of the character alleged.

"But it does not lie in the mouth of defendant to say that another person—Helena—is liable for the salaries"; so say appellant's counsel, and *Lumley v. Gye*, 2 El. & Bl. 216, is cited in support of this position. That case, which was for damages directly due to the malicious act of Gye in procuring an opera singer to abandon her contract with Lumley, was decided upon principles wholly foreign to the case at bar; and without indicating whether we should, under appropriate circumstances, care to follow it, we note in the opinion of Compton, J., this language: "The damages occasioned by such malicious injury might be calculated upon a very different principle from the amount of the debt which might be the only sum recoverable on the contract. \* \* \* The servant or contractor may be utterly unable to pay anything like the amount of the damage sustained entirely from the wrongful act of the defendant." In the case at bar damage might have been claimed upon a different basis and therefore calculated upon a different principle and upon the amount of the unpaid salary; but it was not. The city of Helena may be utterly unable to pay the salary arrears, and the damage sustained by appellant may be due entirely to the wrongful act of respondent; but, if so, these facts have not been made to appear. This being true, there was a lack of proof; and for this reason the judgment must be affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

## ON REHEARING.

(Submitted June 11, 1913. Decided July 7, 1913.)

MR. JUSTICE SANNER delivered the opinion of the court.

After a careful consideration of the propositions submitted on rehearing by counsel for appellant, we are convinced that the result reached in the opinion heretofore announced is the right one. Much contention is based upon the use in the opinion of the following language: "There was an offer of proof that the city had exceeded the constitutional limit of indebtedness, but this was rejected, and properly so, for lack of an allegation in the pleadings." This statement is not literally correct. The trial court did reject the evidence referred to in the first instance for the reason stated, but later caused the record to show that evidence had been received of the fact that the indebtedness of the city was beyond the constitutional limit. However, the remark quoted was made merely in passing. The presence in the record of the fact referred to is not decisive of this appeal. The record still falls short of establishing a causal connection between the unlawful preclusion alleged, and the loss of emoluments. It still fails to show by competent evidence how the utterly void act of Edwards could produce the result complained of or that the city could not have been made to pay the salaries of appellant and his associates as they accrued. We do not feel that the judgment-roll in the *mandamus* suits presented in evidence can be considered for any purpose, save that for which they were pleaded, to-wit: that there was adjudicated therein the right of appellant and his associates to the offices in question.

Judgment affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.



DAILY, RESPONDENT, v. MARSHALL ET AL., DEFENDANTS;  
MILLS, APPELLANT.

(No. 3,246.)

(Submitted April 19, 1913. Decided May 14, 1913.)

[133 Pac. 681.]

*Corporations—Annual Reports—Failure to Make—Liability of Directors — Complaint — Sufficiency — Collateral Attack — Estoppel — Statutes — Constitutionality — Evidence — Admissibility.*

Corporations—Directors—Annual Reports—Failure to Make—Complaint.

1. One who seeks to hold directors of a corporation liable for failure to comply with the provisions of section 3850, Revised Codes, as amended (Laws 1909, Chap. 140), relative to filing the annual report therein specified, must allege facts and circumstances clearly showing that the liability has attached, nothing being presumed in favor of the pleader.

Same—Complaint—Sufficiency—Construction—Implication.

2. Since, under section 3833, Revised Codes, a corporation for profit must have a capital stock, an allegation that a concern was organized and operated for profit implies that in order to have any legal existence it must have had a capital stock; hence, under the rule that whatever is necessarily implied or reasonably to be inferred from an allegation in a pleading is to be taken as directly averred, the allegation, in an action of the character referred to in paragraph 1, *supra*, was sufficient as against the objection that it did not directly aver that the corporation had a capital stock.

Pleading and Practice—Complaint—Insufficiency—Mode of Attack.

3. For purposes of attack on a complaint for insufficiency, a motion for judgment on the pleadings, an objection to the introduction of evidence, and a motion for nonsuit raise only such questions as arise upon a general demurrer.

Corporations—Statutes—Failure to Observe—Dissolution—Collateral Attack.

4. After a corporation has come into existence as provided by section 3825, Revised Codes, failure to observe the requirements prescribed by section 3829 *et seq.*, relative to the adoption of by-laws, the election of directors and officers, *etc.*, though rendering the corporate franchise and privileges subject to forfeiture under section 3892, by affirmative action by the state, does not *ipso facto* work a dissolution of it or lay its corporate capacity open to attack collaterally by a private citizen in a controversy between him and the corporation.

Same—Duties of Directors—Estoppel.

5. A corporation cannot, after having been engaged in business apparently in good faith, avoid liabilities incurred under the corporate name, on the ground that its directors had not, in the conduct of its private affairs, observed the forms of law in perfecting its organization and that therefore it had ceased to exist as a corporation; nor can a director thereof, whether properly chosen or not, after taking an active part in the conduct of its business, deny its corporate being on such ground, in order to escape personal liability under section 3850, *supra*, for failure to file the annual report therein required.

Same—Statutes—Constitutionality.

6. Section 3850, *supra*, held not unconstitutional as casting "liabilities and burdens upon domestic corporations from which foreign corporations are exempt," the penalty for failure to file the annual report being placed upon the officers and directors and not upon the corporation.

Same—Statutes—Strict Construction.

7. Section 3850, *supra*, is penal only in the sense that it creates a liability not known to the common law, and therefore must be strictly construed.

Same—Constitution—Directors—Penal Statutes.

8. A fine within the meaning of section 20, Article III, of the Constitution, which declares that excessive fines, etc., shall not be inflicted, is a penalty exacted by the state for a criminal offense; therefore, such provision has not any application to the penalty imposed upon directors of a corporation for neglect to file the annual statement required by section 3850, Revised Codes, as amended.

Same—Documentary Evidence—Admissibility.

9. Papers signed by defendant as director which tended to show that his corporation had been engaged in doing business as such and that he and his associates had acted in the capacity of directors, were properly admitted in evidence as showing use of the corporate franchise.

Same—Existence—Question for Court, When.

10. The question whether a corporation was in existence *de jure* or *de facto* was one of law for the court, where the evidence did not present a disputed question of fact.

*Appeal from District Court, Missoula County; F. C. Webster, Judge.*

ACTION by John R. Daily against Thomas C. Marshall, Thomas N. Marlowe and W. P. Mills. Judgment for plaintiffs and defendant Mills appeals from it and an order denying his motion for a new trial. Affirmed.

*Mr. Frank A. Roberts*, and *Messrs. Gunn, Rasch & Hall*, for Appellant, submitted a brief; *Mr. Roberts* and *Mr. Carl Rasch* argued the cause orally.

The liability of the appellant for the respondent's claim and demand is sought to be established under the provisions of the Act of 1909 (Laws 1909, p. 217), but in order to do so, it was incumbent upon the plaintiff, as was said by the court of appeals of New York in the case of *Whitney v. Cammann*, 137 N. Y. 342, 33 N. E. 305, to "allege and prove affirmatively every fact and circumstance upon which his right to recover depends, and nothing will be presumed in his favor." And, as was stated by Judge Thompson in his work on Corporations (2 Thompson on

Corporations, 2d ed., par. 1337): "It would require no judicial determination to establish the rule that there could be no liability on the part of the directors or trustees unless the corporation came strictly within the terms of the statute." Inasmuch as the statutory requirement to file annual reports is applicable only to corporations "having a capital stock," it was necessary for the plaintiff to allege in his complaint, *inter alia*, that the Missoula Palace Market was a corporation coming within the description of that class of corporations upon whom it has been made obligatory to file such reports. (See *Wetthey v. Kemper*, 17 Mont. 491, 43 Pac. 716; *Marshall v. Barr*, 27 App. Div. 97, 50 N. Y. Supp. 116; *Church v. Butterfield*, 19 Misc. Rep. 265, 44 N. Y. Supp. 381; *Anfenger v. Anzeiger Pub. Co.*, 9 Colo. 377, 12 Pac. 400.)

There was not the slightest pretense on the part of any of the incorporators to comply with the statutory requirements necessary to enable the corporation to act in a corporate capacity or use its corporate franchise. The mere filing of the articles of incorporation did not confer upon the Missoula Palace Market, or its incorporators, the power or authority to transact business as a corporation. There never was an attempt made to organize the company in compliance with the law; the concern never at any time was anything but a corporation on paper; there was no user whatever of any corporate functions after the filing of the articles of incorporation, and on August 2, 1907, its corporate existence came to an end by virtue of section 3892 of the Revised Codes, the provisions of which are self-executing, and a failure to organize within the time limited by its provisions terminates the existence of the corporation. (*Kaiser Land & Fruit Co. v. Curry*, 155 Cal. 638, 103 Pac. 341; *Farnham v. Benedict*, 107 N. Y. 159, 13 N. E. 784; *In re Brooklyn, Q. C. & S. R. Co.*, 185 N. Y. 171, 77 N. E. 994; *Los Angeles Ry. Co. v. City of Los Angeles*, 152 Cal. 242, 92 Pac. 490; *Hawley v. Bonanza Queen Min. Co.*, 61 Wash. 90, 111 Pac. 1073.) Without organizing, the corporation remains a mere form, without substance or vitality, and the statute fixes the time within which it must "put on the habiliments of a corporation," or cease to exist. (*Walton v.*

*Oliver*, 49 Kan. 107, 33 Am. St. Rep. 355, 30 Pac. 172. See, also, *Nehama Coal Co. v. Settle*, 54 Kan. 424, 38 Pac. 483; *Carolina etc. Ry. Co. v. McCown*, 84 S. C. 318, 66 S. E. 426 (citing *Walton v. Oliver*, *supra*); *Watson v. Albany etc. Ry. Co.*, 111 Ga. 10, 36 S. E. 324; *Whetsone v. Crane Bros. Mfg. Co.*, 1 Kan. App. 320, 41 Pac. 211; *Wechselberg v. Flour City Nat. Bank*, 64 Fed. 90, 26 L. R. A. 470, 12 C. C. A. 56.)

The only evidence of apparent corporate action by the Missoula Palace Market were the reports filed in January, 1908 and 1909, and a notice of a stockholders' meeting, published on January 8, 1910. But this did not prove, or tend to prove, the existence of either a *de jure* or a *de facto* corporation. In the case of *Milwaukee Gold Extraction Co. v. Gordon*, 37 Mont. 209, 95 Pac. 995, this court enumerated the requisites of proof necessary to establish the existence of a *de facto* corporation. The absence of any one of the above requirements defeats the claim. (*Farmers' Mutual v. Reser*, 43 Ind. App. 634, 88 N. E. 349.) As in the Milwaukee Gold Extraction Company case, so here there is a complete failure of proof with respect to two of the prerequisites. The Missoula Palace Market was never attempted to be organized as a corporation, and it never did, nor attempted to do, any business as such. (See *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. 368; *Kirkland v. Kille*, 99 N. Y. 390, 2 N. E. 36; *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386; *Emery v. De Peyster*, 77 App. Div. 65, 78 N. Y. Supp. 1056.)

A corporation *de facto* must be established by the proof of the existence of some law under which a corporation with the powers assumed might lawfully be created, together with the user by the alleged corporation of the rights claimed to be conferred by such law. The acts showing such user must be definitely corporate acts and not such as can be performed by a partnership or an individual.

Not only was it incumbent upon the plaintiff to show that the Missoula Palace Market was a legally organized corporation, but it also devolved upon him to prove that his claim was a corporate debt, for the payment of which the corporation had become liable as such. (*National Park Bank v. Remsen*, 43 Fed. 226;

s. c., 158 U. S. 337, 39 L. Ed. 1008, 15 Sup. Ct. Rep. 891; *Jones v. Barlow*, 62 N. Y. 202; *Rector etc. of Trinity Church v. Vanderbilt*, 98 N. Y. 170; *Gold v. Clyne*, 134 N. Y. 262, 17 L. R. A. 767, 31 N. E. 980.) As was held by this court in *Farrell v. Gold Flint Min. Co.*, 32 Mont. 416, 80 Pac. 1027, a corporation acts through its board of directors as an entity, and not through the individuals who compose such board, and evidence that three directors acknowledged the justness of a claim and agreed that it should be paid did not establish an obligation against the corporation, in the absence of proof that they constituted a majority of the board, or that they acted otherwise than in their individual capacity. To the same effect: *Wagner v. St. Peter's Hospital*, 32 Mont. 206, 79 Pac. 1054; *Brown v. Valley View Min. Co.*, 127 Cal. 630, 60 Pac. 424; *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607, 3 Morr. Min. Rep. 516; *Clement v. Young-McShea Amusement Co.*, 70 N. J. Eq. 677, 67 Atl. 82; *Donoghue v. Indiana etc. Ry. Co.*, 87 Mich. 13, 49 N. W. 512; *Hamlin v. Union Brass Co.*, 68 N. H. 292, 44 Atl. 385; *Citizens' Securities Co. v. Hammel*, 14 Cal. App. 564, 112 Pac. 731; *Extension Gold M. & M. Co. v. Skinner*, 28 Colo. 237, 64 Pac. 198.

Section 3850 of the Revised Codes, as amended, is in conflict with, and violative of, section 11, Article XV, of the Constitution of Montana, in that it imposes liabilities and burdens upon domestic corporations from which foreign corporations are exempt. (See *Uihlein v. Caplice Commercial Co.*, 39 Mont. 327, 102 Pac. 564; *Criswell v. Montana Central Ry. Co.*, 18 Mont. 167, 33 L. R. A. 554, 44 Pac. 525.)

If this were a case where the liability or burden imposed upon domestic corporations could not also legally be imposed upon foreign corporations, or, if imposed, could not be enforced, then the constitutional provisions would probably be held to have no application, as was done in *State v. Thomas Cruse Savings Bank*, 21 Mont. 50, 45 L. R. A. 760, 52 Pac. 733. But the decision of the supreme court of the United States in *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123, 13 Sup. Ct. Rep. 224, makes the rule laid down in the *Thomas Cruse Savings Bank Case* inapplicable here. As said by this court in *Lewis v.*

*Northern Pac. Ry. Co.*, 36 Mont. 207, 92 Pac. 469, a foreign corporation "cannot occupy any higher ground than a domestic corporation engaged in the same kind of business."

The section is also in conflict with, and violative of, section 20, Article III, of the Constitution of Montana, in that it imposes an excessive fine and inflicts unusual punishment. The penalty inflicted for the failure to file the annual statement is that the directors of the corporation shall personally be liable for all of the debts then existing or which may thereafter be incurred. It will be noticed that there is no limit to the penalty. That it is a penalty cannot be disputed, for this court has so held many times. (See *Gans v. Switzer*, 9 Mont. 408, 24 Pac. 18; *Teitig v. Boesman Bros. Co.*, 12 Mont. 404, 31 Pac. 371; *Elkhorn Tea Co. v. Mining Co.*, 16 Mont. 322, 40 Pac. 606; *Wethey v. Kemper*, 17 Mont. 491, 43 Pac. 716; *State Savings Bank v. Johnson*, 18 Mont. 440, 56 Am. St. Rep. 591, 33 L. R. A. 552, 45 Pac. 662.) Is not the practical effect of this section the imposing of excessive fines and the infliction of unusual punishment within the spirit of said constitutional provision?

*Mr. A. N. Whitlock*, and *Mr. Harry H. Parsons*, for Respondent, submitted a brief; *Mr. Whitlock* argued the cause orally.

While we admit that under the laws of this state there may be corporations with or without capital stock, we contend that section 3833 of the Revised Codes shows that corporations for profit must be corporations having capital stock. Since the section provides that such corporations must be conducted by a board of directors and such board must be possessors or holders of stock therein, the conclusion seems so obvious that further argument is unnecessary. In view of the provisions of said section, we submit that the allegation in plaintiff's complaint, "that at all times herein mentioned, the Missoula Palace Market was, has continued to be, and is, a corporation, organized and operated for profit under the laws of the state of Montana," was sufficient.

Appellant seems to rely upon the case of *Marshall v. Barr*, 27 App. Div. 97, 50 N. Y. Supp. 116, in which the point raised was almost identical with the one under consideration, but upon

close examination it will be seen that in this case there was no allegation whatever that the corporation was a stock corporation as required in order to bring it within the statute, nor was there any allegation from which it could be reasonably inferred that the corporation was such a corporation. In *Union Bank of Buffalo v. Keim*, 52 App. Div. 135, 64 N. Y. Supp. 1070, a case decided in the same jurisdiction two years later, may be found a case practically identical with the case at bar. This case was an action against a director to enforce liability under a statute providing that directors of corporations other than railroad or moneyed corporations should be liable for corporation debts on failure to file annual reports. Section 2 of the same statute provided that stock corporations should be moneyed, transportation or business corporations. It was held that an allegation that the defendant director was a director of a business corporation was sufficient. To the same effect may be cited *Acker v. Richards*, 63 App. Div. 305, 71 N. Y. Supp. 929; *Boynnton v. Sprague*, 100 App. Div. 443, 91 N. Y. Supp. 839. The foregoing argument makes it unnecessary to deal with the nicer question which would have been presented had there been no section 3833. But even if such a case were presented, it might well be contended that inasmuch as plaintiff alleges a failure on the part of defendants to comply with the requirements of section 3850, that was sufficient to raise a presumption in favor of the pleader that the corporation was one coming within this section, and that the defendant had the duty of pleading that this corporation was exempt from the section. (*Harmon v. Fox*, 31 Mont. 324, 78 Pac. 517; *Acker v. Richards*, *supra*.)

It is our contention that under a general incorporation law similar to ours, where the statute does not make or specify other prerequisites, corporate existence and the right to do business as a corporation date from the time the secretary of state delivers his certificate, as provided in section 3825. This is certainly so where there has been strict compliance in good faith with all the requirements preceding the issuance of the certificate. A few of the leading cases will be sufficient to substantiate the

general proposition just stated: *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889; *Fayetteville St. Ry. Co. v. Aberdeen R. R. Company*, 142 N. C. 423, 9 Ann. Cas. 683, 55 S. E. 345; *Rose Hill & E. R. Co. v. People*, 115 Ill. 133, 3 N. E. 725. To the effect that subscription to the capital stock is not a prerequisite to incorporation or to the doing of business as a corporation, see *National Bank v. Texas Inv. Co.*, 74 Tex. 421, 12 S. W. 101; *Johnson v. Kessler*, 76 Iowa, 411, 41 N. W. 57; *Thornton v. Balcom*, 85 Iowa, 198, 52 N. W. 190; *Chicago, K. & W. R. Co. v. Commissioners of Stafford Co.*, 36 Kan. 121, 12 Pac. 593. On the point that mere failure to elect directors does not invalidate, see *Drake v. Herndon*, 122 Ky. 206, 91 S. W. 674. On the general point that incorporation dates from the time articles were filed, see *State v. Rotwitt*, 18 Mont. 87, 44 Pac. 409; *Badger Paper Co. v. Rose*, 95 Wis. 145, 37 L. R. A. 162, 70 N. W. 302; *Mokelumne Hill Canal & Min. Co. v. Woodbury*, 14 Cal. 424, 73 Am. Dec. 658; *Sentinel Co. v. Meiselbach Motor Wagon Co.*, 144 Wis. 224, 140 Am. St. Rep. 1007, 128 N. W. 861, 862.

It is true that there were many irregularities in the organization of the corporation and the conducting of its affairs after it became one; but these irregularities, such as the failure to adopt by-laws, elect directors, and the like, were simply directory provisions. If our contentions on that point should not prevail, we submit that these irregularities, and in fact all irregularities or objections arising after the corporation has sufficiently complied with the law to entitle it to receive its certificate, and has received such certificate, as here, are at most only causes of forfeiture which are not self-executing, but may be taken advantage of only by the state, in a direct proceeding instituted for that purpose. (*Murphy v. Wheatley*, 102 Md. 501, 63 Atl. 62; *Arkansas etc. Ry. Co. v. St. Louis etc. Ry. Co.*, 103 Fed. 747; *Jones v. Dodge*, 97 Ark. 248, 133 S. W. 828; *Cluthe v. Evansville etc. Ry. Co.* (Ind.), 95 N. E. 543; *Cheraw & Chester R. R. Co. v. White*, 14 S. C. 51; *Merrick v. Van Santvoord*, 34 N. Y. 208; *In re Shakopee Iron & Brass Wks.*, 37 Minn. 91, 33 N. W. 219; *Van Wyck v. Knevals*, 106 U. S. 360, 27 L. Ed. 201,



1 Sup. Ct. Rep. 336; *Toledo & Ann Arbor R. R. Co. v. Johnson*, 49 Mich. 148, 13 N. W. 492; *In re Kings County Elevated R. R. Co.*, 105 N. Y. 97, 13 N. E. 18.)

Where an action is brought against the director of a corporation, on a corporate liability, he is estopped to deny the valid incorporation of the company, where it is shown that he had held himself out as a director, and has transacted corporate business as such. (*Fitzpatrick v. O'Neill*, 43 Mont. 552, Ann. Cas. 1912C, 296, 118 Pac. 273; *Corey v. Morrill*, 61 Vt. 598, 17 Atl. 840; *Tanner v. Nichols*, 25 Ky. Law Rep. 2191, 80 S. W. 225; *Parrott v. Byers*, 40 Cal. 614, 13 Morr. Min. Rep. 505; *Marshall Fdy. Co. v. Killian*, 99 N. C. 501, 6 Am. St. Rep. 539, 6 S. E. 680.) We contend that defendant Mills, by his conduct throughout all the dealings between the plaintiff and Missoula Palace Market, brings himself within the doctrine of the cases cited above.

Appellant further contends that it was incumbent upon plaintiff to show not only that the Missoula Palace Market was a corporation, but that plaintiff's claim was a corporation debt. Most of the transactions in connection with the running of the Missoula Palace Market were, it is true, carried on by the defendant Mills, but the evidence shows that all the other directors either agreed to or acquiesced in all that was done; they took no action to disaffirm his acts. That is sufficient to show corporate action. (*Farrell v. Gold Flint Min. Co.*, 32 Mont. 416, 80 Pac. 1027; *Fitzpatrick v. O'Neill*, 43 Mont. 552, Ann. Cas. 1912C, 296, 118 Pac. 273; *Salem Iron Co. v. Consolidated Iron Mines*, 112 Fed. 239, 50 C. C. A. 213; *Miller v. Matthews*, 87 Md. 464, 40 Atl. 176; *Sherman v. Fitch*, 98 Mass. 59.) Under circumstances like those in the present case, formal action by the directors as a board is not necessary. (*G. & B. Min. Co. v. First Nat. Bank*, 95 Fed. 23, 36 C. C. A. 633; *Blood v. La Serena Land & Water Co.*, 134 Cal. 361, 66 Pac. 317.)

As to the constitutionality of section 3850, attacked on the ground that it violates section 20, Article III, of the Constitution: A fine is a precautionary penalty, exacted by the state for some criminal offense. (*Southern Exp. Co. v. Common-*

*wealth*, 92 Va. 59, 41 L. R. A. 436, 22 S. E. 809; *State v. Missouri Pac. R. R. Co.*, 64 Neb. 679, 90 N. W. 877; *City of Hudson v. Granger*, 23 Misc. Rep. 401, 52 N. Y. Supp. 9; *People v. Nedrow*, 122 Ill. 363, 13 N. E. 533.) Section 3850 does not come within the rule of those cases. It is penal in its nature only in the sense that it requires strict construction. (*Manhattan Trust Co. v. Davis*, 23 Mont. 273, 58 Pac. 718; *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123, 13 Sup. Ct. Rep. 224; *Davis v. Mills*, 99 Fed. 39; *Flash v. Conn.*, 109 U. S. 371, 27 L. Ed. 966, 3 Sup. Ct. Rep. 263; *Fitzgerald v. Weidenbeck*, 76 Fed. 695.) There is nothing harsh or oppressive in its requirements.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action by respondent to recover from appellant the sum of \$5,347.13, alleged to be due on account of goods, wares and merchandise sold and delivered to the Missoula Palace Market, a corporation, organized and existing under the laws of Montana. The theory upon which appellant is sought to be held is, that, as president and director of the corporation, he failed to file, or have filed, in the office of the clerk and recorder of Missoula county, the place where the corporation has its principal place of business, for the year 1910 the report required by section 3850 of the Revised Codes. On August 2, 1906, the appellant, W. P. Mills, filed with the county clerk of Missoula county articles of incorporation of the "Missoula Palace Market." These were executed and acknowledged by Mills, Thomas C. Marshall and Thomas N. Marlowe. Thereafter a certified copy was filed with the secretary of state, and there was duly issued by him a certificate under the seal of the state. The articles recited that Mills, Marshall and Marlowe were the directors having charge of the corporation during the first three months of its existence; that its corporate stock was \$3,000, divided into 3,000 shares of one dollar each, and that each of the incorporators was a subscriber for one share. The stock was declared nonassessable but was to be fully paid when issued. It does not appear that the directors formally organized

by the election of officers or the adoption of by-laws, or that an election of directors was thereafter had. No certificates of stock were thereafter issued. On December 12, 1907, the appellant Mills entered into a written contract with one J. D. Watts, wherein he represented himself to be the owner of all the capital stock of the corporation, and agreed to sell to Watts three-fourths of it for the sum of \$3,000. The writing provided that Watts should have charge, management and conduct of the business of the corporation, the same being the "butcher and meat business now carried on" in Missoula. Watts was to receive a salary of \$125 per month, and he and Mills were to divide "the proceeds or dividends of said business in the proportion of their holdings." Watts took charge at once and conducted the business until March 6, 1910. He did not pay the note given to Mills as the purchase price under the terms of the agreement. He never received any shares of stock. Prior to Watts' connection with the business, Mills was manager and, according to his own testimony, sole owner of it until it was closed up by an attachment by himself in March, 1910. From its establishment until Watts took charge, and thereafter until it was closed up, the business was conducted in the corporate name. When Watts assumed charge an indebtedness of about \$2,200 had been incurred. Checks issued by him were signed with the corporate name, by Watts himself or his daughter, who was the bookkeeper. On January 17, 1908, Mills verified an annual statement such as was required by the statute (Rev. Codes, sec. 3850), signed by himself, Marshall and Marlowe, and caused it to be filed with the clerk and recorder of Missoula county, wherein it was recited that the Missoula Palace Market is "a corporation organized and existing under the laws of Montana," and that Mills was the president and a director of it; that Watts was its general manager; and that Marshall was its secretary. A report reciting the same facts, verified by Mills, was filed for record on January 19, 1909. In each of these reports is the statement that "the amount of capital stock actually paid in cash is the sum of \$3,000." The testimony given by Mills at the trial was in part as follows: "Q. Who was

doing business before Mr. Watts got there? A. The Missoula Palace Market it was called. Q. What is the company of which you were president part of the time and Mr. Watts part? A. The business ran there, we called it the Missoula Palace Market. Q. Who was manager when Watts came? A. I was. \* \* \* Q. Where did you get the money to pay that rent with? A. Why, he took it out of the corporation, I guess. \* \* \* Q. Did you ever call a meeting or advertise for a meeting? \* \* \* A. I know the secretary—Marshall—called a meeting. \* \* \* We met several times; Col. Marshall, Mr. Watts and myself. \* \* \* I was trying to get Mr. Watts to settle the business up; I was being told I might be held responsible. \* \* \* I think I met Mr. Daily about January, 1910. \* \* \* I told him not to give any more credit to the Market. \* \* \* The meat market of which Mr. Watts was in charge did business up to the time that I attached it." Touching the contract between himself and Watts he testified: "That paper was made out in that form as security; I transferred the entire property to Mr. Watts for \$3,000. The understanding was that I sold Mr. Watts this property for \$3,000, that he was to have absolute control of it; that he was to allow me to remain as a quarter owner that I might, as security, have some control of the shop, while I verbally was never to receive anything from it except the original cost. When he paid that \$3,000 it was to be his, any day he wanted to pay the \$3,000." The plaintiff testified: "Q. Tell what Mr. Mills said in relation to the corporation. A. He said that he was willing to give me all he could get out of the Missoula Palace Market, but he didn't want to go down in his pocket and give any more."

In his affidavit to obtain the attachment in his action against the corporation, it was stated by Mills that "the said John D. Watts on or about the 12th day of December, 1907, became the manager of the business of the defendant corporation, Missoula Palace Market, and continued in that capacity until about the 6th day of March, 1910," when his "authority as said manager was severed and terminated." This was brought about by a letter to Watts from Mills, Watts being "requested to stay away

from the Market and to receive no more mail \* \* \* belonging to the Missoula Palace Market." The attachment suit was subsequently dismissed, and Mills' attorney took possession of the assets of the concern. On January 8, 1910, Marshall, with the consent of Mills, published a notice in the "Daily Missoulian," calling a meeting of the "stockholders of the Missoula Palace Market." The notice stated that the meeting was to be the annual meeting for the election of directors for the ensuing year. It was signed by Mills as president and director. It does not appear whether a meeting was held pursuant to this notice. The business had been conducted in a leased building, the lease running to the corporation by name. This lease was renewed in March, 1910. At one time Watts had some stationery printed for the corporation. By mistake the printer designated Watts as the proprietor instead of manager. This was made use of during the course of the business. No annual report for the year 1910, as required by section 3850, *supra*, as amended by the Act approved March 11, 1909 (Laws 1909, p. 217), was filed by the president or directors of the corporation, or by any director thereof. From November, 1909, and up to March 9, 1910, there became due from the Missoula Palace Market for goods, wares and merchandise sold and delivered to it by respondent, the sum of \$5,347.13. Demand was made by respondent upon Mills for payment. Upon his refusal to pay this action was brought, resulting in a verdict and judgment for respondent. These appeals are from the judgment and an order denying appellant's motion for a new trial. There was substantially no conflict in the evidence, the appellant himself being the principal witness examined by respondent.

1. The first contention made is that the complaint does not state a cause of action, in that it does not allege that the Missoula Palace Market is a corporation having a capital stock. The allegation on this subject is "that at all times herein mentioned the Missoula Palace Market was, has continued to be and is a corporation, organized and operated for profit," *etc.* Amended section 3850, *supra*, declares: "Every corporation, having a capital stock, except banks, trust companies and build-

ing and loan associations, shall annually, within twenty days from and after the thirty-first day of December, file in the office of the clerk of the county in which the principal place of business of such corporation is situated, a report which shall state,"

[1] *etc.* The argument of counsel for appellant is that, since this section is penal in character, it is incumbent upon one who seeks to hold directors of a corporation liable upon failure to comply with it, to allege and prove affirmatively every fact and circumstance upon which his right to recover depends, nothing being presumed in his favor. The rule invoked is undoubtedly sound. It was recognized by this court in *Gans v. Switzer*, 9 Mont. 408, 24 Pac. 18, and *Weihey v. Kemper*, 17 Mont. 491, 43 Pac. 716. While the liability imposed by the statute is often called penal, it is not so in the sense in which that term is commonly used. It is so only in the sense that the liability was not known at the common law but is entirely of statutory origin. For this reason the legislative declaration of the rule may not be construed to include cases which do not fall clearly within its terms. (2 Morawetz on Corporations, 2d ed., sec. 908.) In every case, therefore, the pleading should allege facts and circumstances showing that the liability has attached.

Under section 3833 the corporate powers, business and property of all corporations must be controlled by not less than [2] three nor more than thirteen directors to be elected from among the holders of stock, or, when there is no capital stock, from among the members of such corporation. Among other things, it provides: "Directors of corporations for profit must be holders of stock therein in an amount to be fixed by the by-laws of the corporation, except those named in the articles of incorporation for the first three months, who shall be directors until their successors are elected and qualified. Directors of all other corporations must be members thereof." This section, and also section 3822, recognizes that there may be corporations without a capital stock; yet, since under section 3833 a corporation for profit must have a capital stock and stockholders, the allegation that the Missoula Palace Market was organized and operated for profit, clearly and necessarily implies that it is

of the class which must, in order to have any legal existence at all, have a capital stock. This renders the complaint sufficient within the rule stated in *County of Silver Bow v. Davies*, 40 Mont. 418, 107 Pac. 81, viz., that whatever is necessarily implied or reasonably to be inferred from an allegation in a pleading is to be taken as directly averred. (See, also, *Harmon v. Fox*, 31 Mont. 324, 78 Pac. 517.)

The sufficiency of the pleading was questioned in the trial court by general demurrer, by motion for judgment on the pleadings, by objection to the introduction of evidence, and [3] by motion for nonsuit. If open to attack at all, it was by special demurrer for indefiniteness and not by general demurrer or any of the other methods resorted to, each of which raises, so far as the sufficiency of the complaint is assailed, only such questions as arise upon general demurrer.

2. The next contention is that after the certificate had been issued by the secretary of state, no steps whatever were taken by the incorporators to organize the corporation by the adoption of by-laws, the election of directors, the organization of the board, the election of officers, or the observance of other similar requirements prescribed by sections 3829, 3830, 3832, 3833, 3834, 3836 and 3848 of the Revised Codes. Hence, it is argued that, though the articles were properly executed and filed and the certificate issued by the secretary of state, the failure to observe these requirements resulted automatically in the death of the corporation by the forfeiture of its franchise at the end of one year, with the result that thereafter it could not transact business as a corporation. Counsel rely upon section 3892, Revised Codes, which provides: "If a corporation does not organize and commence the transaction of its business or the construction of its works within one year from the date of its incorporation, its corporate powers cease. The due incorporation of any company, claiming in good faith to be a corporation under this Part, and doing business as such, or its right to exercise corporate powers, shall not be inquired into, collaterally, in any private suit to which such *de facto* corporation may be a party; but such inquiry may be had at the suit of the state on in-

formation of the attorney general." In order to ascertain the scope and meaning of the first provision of this section it is necessary to notice what steps must be taken to bring a corporation into existence and how a dissolution of it or a forfeiture of its franchise may be wrought. Section 3807 provides: "Private corporations may be formed by the voluntary association of any three or more persons in the manner prescribed in this Article." Under section 3825 a corporation may be formed for any of the purposes enumerated in section 3808, (1) by the preparation and filing of the articles with the clerk of the county in which the principal business of the company is to be transacted, and (2) by filing with the secretary of state a copy thereof certified by the clerk. The secretary must then issue to the corporation his certificate that a copy of the articles, containing a statement of the facts required by section 3825, has been filed in his office. "Thereupon the persons signing the articles and their associates and successors shall be a body politic and corporate by the name stated in the certificate," *etc.* Section 3905 declares: "A corporation is dissolved: (1) By the expiration of the time limited by its charter; or, (2), by a judgment of dissolution, in the manner provided by the Code of Civil Procedure \* \* \* ; (3) By an Act of the legislative assembly." By section 3898 a sale by the corporation of all of its property *ipso facto* operates as a dissolution. By reference to section 6944 it will be seen that an action lies in the name of the state to dissolve a corporation in the several instances therein enumerated, among which are: "2. When it has forfeited its privileges and franchises by nonuser"; and "3. When it has committed or omitted an act which amounts to a surrender of its corporate rights, privileges and franchises."

Considering all of these provisions together, we think the intention of them is obvious, *viz.*: that when the steps required [4] by section 3825 shall have been observed, the corporation comes into existence; that failure to observe the requirements as to the adoption of by-laws, the subsequent election of directors, the election of officers, and the like (sec. 3829 *et seq.*, *supra*), renders the franchises and privileges subject to forfeit-



ure, but does not *ipso facto* work a dissolution nor permit question to be made as to the corporate capacity in a collateral way by any private citizen in a controversy between him and the corporation. In other words, after the corporation has come into existence as provided by section 3825, it continues to exist for the period fixed by the statute (*Gans v. Switzer, supra*), or until by affirmative action the state has had a forfeiture judicially declared. This is clearly the import of the last provision of section 3892, for it says so in terms the meaning of which cannot be mistaken; and this is in full accord with the theory of the inhibition in section 3810, which provides: "One who assumes an obligation to an ostensible corporation, as such, cannot resist the obligation on the ground that there was in fact no such corporation until the fact has been adjudged in a direct proceeding for the purpose." This must be deemed to be the legislative intention in enacting these several provisions, or else the question whether there is or is not a corporation is left open to investigation in every case in which an ostensible corporation seeks to avoid liability as such, or whenever, as here, it is sought by one or more directors to avoid liability for their omission to observe the requirements of the statute. Therefore, construing the first provision of section 3892, together with the last, in the light of the other provisions referred to, it can be assigned no other effect than to fix a rule by which judicial decision shall be controlled whenever the question of corporate capacity is properly presented by the state itself.

The legislature may make such requirements as it deems proper as conditions precedent to the exercise of corporate power. For illustration: It may require the payment of a license tax as a condition precedent to the doing of any business by the corporation. A failure to comply with such a requirement *ipso facto* works a forfeiture, and the corporation ceases to exist. In such a case a judgment of a court is not necessary to render the forfeiture effective, because the statutory declaration is self-executing. (*Kaiser Land & Fruit Co. v. Curry*, 155 Cal. 638, 103 Pac. 341.) So, also, it may declare that a failure to comply with a requirement imposed as a condition subsequent shall

*ipso facto* work a forfeiture; such statutes are also self-executing. (*Los Angeles Ry. Co. v. City of Los Angeles*, 152 Cal. 242, 125 Am. St. Rep. 54, 15 L. R. A. (n. s.) 1269, 92 Pac. 490.) Ordinarily, however, requirements to be observed subsequent to the creation of a corporation, even though forfeiture for failure to comply with them is declared to be the penalty, are not self-executing. The only acts by which the incorporators notify the public of the creation of a corporation are the records required by section 3825, *supra*. When these have been completed, the corporation becomes, as to those who deal with it, a living, active, responsible entity. The requirements to be observed for the perfection of the organization, the election of officers, and the like, pertain exclusively to its private affairs of which the public can have no information; and in the absence of statutory provisions to the contrary, or of inquisition at the instance of the state, are to be deemed directory only. (10 Cyc. 223; 1 Machen on the Law of Corporations, sec. 163.) Therefore, while the courts differ as to whether particular enactments such as the one found in section 3892, *supra*, should be held self-executing or only directory, they quite generally agree that different results flow from the failure of the directors or officers of the corporation to do those acts which are required as conditions precedent, and those which are required as conditions subsequent. The failure to observe the first results *ipso facto* in forfeiture; omission with reference to the second merely exposes the corporation to the peril of dissolution upon inquisition by the state. Until the forfeiture has been judicially declared at the instance of the state, the corporate existence continues. (*Murphy v. Wheatley*, 102 Md. 501, 63 Atl. 62; *Brown v. Wyandotte & S. E. Ry.*, 68 Ark. 134, 56 S. W. 862; *Briggs v. Cape Cod Ship Canal Co.*, 137 Mass. 71; *Cluthe v. Evansville etc. Co.* (Ind.), 95 N. E. 543; *Cheraw & Chester R. R. Co. v. White*, 14 S. C. 51; *Toledo & Ann Arbor R. Co. v. Johnson*, 49 Mich. 148, 13 N. W. 492; *In re Kings County Elevated R. R. Co.*, 105 N. Y. 97, 13 N. E. 18; *Arkansas & O. R. Co. v. St. Louis & S. F. R. Co.*, 103 Fed. 747.) The principle applicable is the same as when a grant of land is made subject to forfeiture of title upon

failure to perform conditions subsequent. The forfeiture can be enforced only at the instance of the grantor himself by judicial action, or, if the grantor is the state, by legislative action also. (*Van Wyck v. Knevals*, 106 U. S. 360, 27 L. Ed. 201, 1 Sup. Ct. Rep. 336; *Bybee v. Oregon & C. R. Co.*, 139 U. S. 663, 35 L. Ed. 305, 11 Sup. Ct. Rep. 641.)

Accordingly, therefore, when the corporation has regularly been brought into existence, it is not deprived of the right to exercise corporate functions by the failure of the directors, designated by the statute to perfect the organization, to issue stock (*Fayetteville etc. Ry. Co. v. Aberdeen R. Co.*, 142 N. C. 423, 9 Ann. Cas. 683, 55 S. E. 345); or to obtain subscriptions for its stock (*National Bank of Texas v. Investment Co.*, 74 Tex. 421, 12 S. W. 101; *Johnson v. Kessler*, 76 Iowa, 411, 41 N. W. 57; *Thornton v. Balcom*, 85 Iowa, 198, 52 N. W. 190; *Chicago K. & W. R. Co. v. Commissioners of Stafford Co.*, 36 Kan. 121, 12 Pac. 593); or to elect directors (*Drake v. Herndon*, 122 Ky. 206, 91 S. W. 674; *Middleton v. Arastraville Min. Co.*, 146 Cal. 219, 79 Pac. 889; *Morrison v. Clark*, 24 Mont. 515, 63 Pac. 98), even though the taking of these various steps is necessary to the proper use of the franchise. It would be a gross injustice to those who propose to deal with an ostensible corporation to make it incumbent upon them first to ascertain whether in the conduct of its private affairs its directors have proceeded in strict conformity with all the statutory requirements as to the organization of the board of directors, the election of officers, etc., at the peril of being cast in actions subsequently brought by them to enforce their rights against it, upon a plea by it that it has no capacity to be sued. In our opinion it was the purpose of the legislature in enacting section 3892, *supra*, to prohibit inquiry in any private civil action into the question whether the ostensible corporation has a legal existence, further than to ascertain whether the requirements prescribed by section 3825, *supra*, have been observed. If this action had been brought by the Missoula Palace Market as a corporation, to collect an indebtedness due it from the respondent, the latter could not, under section 3810, *supra*, have made defense on the ground

that there is no such corporation. On the other hand, since the [5] . corporation has been engaged in business apparently in good faith, it could not, by the same rule, avoid liability on the ground that its directors had not in the conduct of its private affairs observed the forms of law in perfecting the organization, and therefore that it had ceased to exist as a corporation. It could not be heard to say that it is not such in fact on the ground that the persons who have assumed to act as its directors have omitted to do anything looking to the perfection of its organization or to the conduct of its business according to the forms of law.

Counsel have devoted some space in their briefs to a discussion of the question whether the Missoula Palace Market should be regarded as a corporation *de jure* or *de facto*. We shall not undertake to determine which it is. The rule denying the right to collateral attack applies to the one as well as to the other. The following cases are sufficient for illustration: *Merges v. Altenbrand*, 45 Mont. 355, 123 Pac. 21; *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 13 Am. St. Rep. 903, 8 S. E. 600; *Dean v. Davis*, 51 Cal. 406; *Gunderson v. Illinois T. & S. Bank*, 199 Ill. 422, 65 N. E. 326; *Johnson v. Corser*, 34 Minn. 355, 25 N. W. 799; *Emery v. De Peyster*, 77 App. Div. 65, 78 N. Y. Supp. 1056; *City of Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818; 2 Thompson on Corporations, sec. 1124.

Upon the undisputed facts, so far as concerns the public, the business of the corporation has been conducted in the name of the Missoula Palace Market, as a corporation. Liabilities have been incurred under this name and discharged in the same way. To an outward observer or anyone dealing with it, it has exhibited all the characteristics of a legal person living the life and pursuing the calling for which it was created, according to the course prescribed by law. The appellant has made it serve his purpose. He must therefore be held to bear the penalty which attention to duty on his part as a director would have enabled him to avoid, and this, too, whether he was properly chosen by the board as such director or not. In the section

cited from Mr. Thompson, *supra*, it is said: "It follows naturally and logically from what has been said heretofore, that persons acting as directors or other corporate officers without right, or where they assume to act rightfully by color of office, are subject to all the personal liability which attaches to the rightful incumbents of such offices, whether by the common, the equitable, or the statute law. *De facto* directors and officers cannot plead that they are not such *de jure* in order to escape liability to the corporation or to its creditors for their acts as such, whether such infirmity in their title arises from the fact that they were irregularly elected, or were not legally chosen, or were ineligible at the time they were elected. This principle is illustrated in cases holding directors personally liable for the debts of the corporation where they fail to file an annual report as required by statute; in such cases it is sufficient to show that the directors or trustees were such *de facto* at the time the debt was contracted."

3. It is next contended that amended section 3850 is repugnant to section 11 of Article XV of the Constitution of Montana, in [6] that it imposes liabilities and burdens upon domestic corporations from which foreign corporations are exempt. This section provides: " \* \* \* No company or corporation formed under the laws of any other country, state or territory, shall have, or be allowed to exercise, or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state." The plain purpose of this provision is to restrain the legislature from granting to foreign corporations rights and privileges which cannot be enjoyed by domestic corporations of like character under similar circumstances. (*Criswell v. Montana Central Ry. Co.*, 18 Mont. 167, 33 L. R. A. 554, 44 Pac. 525; *State v. Thomas Cruse Savings Bank*, 21 Mont. 50, 45 L. R. A. 760, 52 Pac. 733.) Within this limitation the legislature is free to impose such burdens upon domestic corporations as it sees fit. In the nature of things, exactly the same system of laws cannot be devised for both domestic and

foreign corporations. Necessarily, laws intended to apply to foreign corporations must be framed upon the theory that they are created under conditions and limitations over which the state legislature has no control. So long as it does not in framing laws discriminate against domestic corporations, its Acts will not be construed as discriminating within the inhibition of the Constitution. It is clear, however, that section 3850 does not discriminate against domestic corporations. Though in terms it imposes the duty of filing the annual report upon the corporation, it in fact imposes it upon the officers and directors and exacts the penalty for nonobservance from them individually, and not from the corporation. In effect, therefore, it is nothing more nor less than a requirement that the officers and directors shall give to the public, from time to time, a statement of the financial affairs of the corporation, at the peril, in case of disobedience, of being held personally for the liabilities which they have permitted the corporation to incur under their management. This is a complete answer to counsel's contention. (*First Nat. Bank v. Weidenbeck*, 97 Fed. 896, 38 C. C. A. 131.)

4. It is said that the statute is violative of section 20 of Article III of the state Constitution, which declares: "Excessive bail shall not be required or excessive fines imposed, or cruel and unusual punishments inflicted." The argument is that since there is no limit to the liability which may be incurred by a failure of the officers and directors to comply with the statute, and since this court has declared the liability penal in its nature (*Gans v. Switzer*, *supra*; *Wethey v. Kemper*, *supra*; *Teitig v. Boesman Bros. & Co.*, 12 Mont. 404, 31 Pac. 371; *Elkhorn T. Co. v. Mining Co.*, 16 Mont. 322, 40 Pac. 606; *State Savings Bank v. Johnson*, 18 Mont. 440, 56 Am. St. Rep. 591, 33 L. R. A. 552, 45 Pac. 662), the result is the imposition of excessive fines and the infliction of unusual punishments within the meaning of the constitutional inhibition. As already pointed out, [7] the statute is not penal in the sense in which that term is generally used. It is so only in the sense that it creates a liability which was not known at the common law and there-

fore must be construed strictly. The very purpose of the legal device known as a corporation is to enable natural persons to engage in business enterprises through the agency of others without incurring personal liability. The extent of immunity is fixed by the law providing for the creation of the artificial body or person, and such a provision as the one in question, being a part of the law of creation, declares the immunity of those who manage the business, viz.: the officers and directors, dependent upon their observance of the conditions imposed by it. They may render their immunity effective by doing this; otherwise they are conclusively presumed to have assented to stand good as sureties for all the liabilities which they have permitted the corporation to assume. In considering the statute in force in 1894 (Comp. Stats. 1887, Fifth Div., sec. 460), the court in *Fitzgerald v. Weidenbeck*, 76 Fed. 695, said: "But, while the statutory liability of trustees has some of the characteristics of a penalty, and attaches upon such kind of default or omission of duty on the part of the trustees as is frequently in like statutes punished by the infliction of a penalty, yet, under this statute, such liability of the trustees is not a penalty, but the withdrawal, as to them, as a consequence of their failure to perform certain duties, of the exemption from personal liability which the statute allowing the incorporation of the company would otherwise afford them, and an allowance to the creditors of the corporation at the time of such default or during such omission of duty, of the further remedy of having the right to proceed in the collection of their debts, directly against the trustees from whom such exemption is withdrawn."

A fine, in the sense in which the term is used in the Constitution, is a penalty exacted by the state for some criminal offense. [8] The provision of the Constitution has no application to the liability involved here.

5. It is argued that the court erred in admitting in evidence [9] copies of the annual reports filed by appellant for the years 1908 and 1909, the affidavit on attachment in the action brought by him against the corporation in March, 1910, and

the written agreement made by him and Watts on December 2, 1907. It is argued that the only purpose for which they were introduced was to show that the Missoula Palace Market was a corporation and doing business as such; whereas its existence had been terminated by operation of law. That it was, in contemplation of law, up to March 10, 1910, a corporation we have already shown. The documents in question tended directly to show not only that it was engaged in business as such, but also that appellant and his associates were assuming to act, and were acting, as its directors. It is true that the appellant assumed to control the business as his own, his associates taking no active part in it. At the same time, they were acting ostensibly as directors of the corporation, their purpose evidently being to assist appellant by permitting him to use their names and thus the corporate franchise. The evidence was competent to show this.

6. The court submitted to the jury an instruction in which it directed them to find for the plaintiff if they believed that the respondent sold and delivered the goods, wares and merchandise, the value of which is in controversy in this case, to the Missoula Palace Market, for the reasonable value thereof, with interest from the time demand for payment had been made upon the appellant. It is argued that the court erred in withdrawing from the jury the question whether the Missoula Palace Market [10] was a corporation. As we view the evidence in the record, however, it presents no disputed question of fact requiring a finding by the jury. Whether the corporation was in existence *de jure* or *de facto* was a question for the court to determine. The court should have directed a verdict for the plaintiff. There was evidence which lent some support to the inference that, as between the appellant and Watts, the latter was to be the owner of the business upon the payment of the \$3,000 note executed by him to the appellant under the contract of December 12, 1907. This, however, was a mere private, secret agreement between them. As to those dealings with Watts there had been no out-



ward change, and we think the court properly treated the evidence in this behalf as immaterial.

The judgment and order are affirmed.

*Affirmed.*

MR. JUSTICE SANNER concurs.

MR. JUSTICE HOLLOWAY did not hear the argument and takes no part in the foregoing decision.

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CALLAHAN, APPELLANT, v. CHICAGO, BURLINGTON &  
QUINCY R. CO., RESPONDENT.

(No. 3,247.)

(Submitted April 16, 1913. Decided May 17, 1913.)

[133 Pac. 687.]

*Personal Injuries—Master and Servant—Railroads—Evidence—  
Declarations—When Admissible—Res Ipsa Loquitur.*

**Declarations—When Admissible in Evidence.**

1. While declarations, to be admissible as part of the *res gestae*, need not have been strictly contemporaneous with the main incident which gave rise to them, they must have been made while the mind of the speaker was laboring under the excitement aroused by the incident, before there was time to reflect and fabricate.

**Same—Admissibility—Discretion.**

2. The admissibility of declarations in evidence is largely a matter of sound legal discretion in the trial court, subject to review only in case of manifest abuse thereof.

**Personal Injuries—Master and Servant—Railroads—Declarations—Admissibility.**

3. Declarations of a freight train conductor made a half hour or more after an accident to his train upon inquiry by plaintiff, a section foreman who sustained injuries while riding thereon, and of a roadmaster, who did not witness the accident but learned of it after it reached its destination, to the effect that the accident was due to a defective coupler, though inadmissible as part of the *res gestae*, held competent as admissions by agents of defendant company made within the scope of their employment while engaged in the discharge of their duties.

**Same—Res Ipsa Loquitur—Applicability of Doctrine.**

4. If in a personal injury action by an employee against his employer, the facts and circumstances brought out on the trial tend to show that the instrumentality which caused the injury was exclusively in the control of the employer and the accident occurred because of some defect

therein, the existence of which was attributable to a negligent omission of duty by the latter, rather than to any other cause, the burden devolves upon him to rebut the presumption of negligence thus raised, by explaining the circumstances so as to render their existence consistent with the exercise of due care on his part.

Same.

5. Held, under the doctrine of *res ipsa loquitur*, that a nonsuit was improperly granted in an action by a railroad employee against the company where plaintiff's proof tended to show that the accident was due to a defective coupler, thus pointing to neglect on the part of defendant to perform a primary nondelegable duty, i. e., to see that the train on which plaintiff was riding was equipped with sound and suitable appliances.

*Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.*

ACTION by Matthew Callahan against the Chicago, Burlington & Quincy Railroad Company. From a judgment of nonsuit plaintiff appeals. Reversed and remanded.

*Messrs. Enterline & La Fleiche, and Messrs. Walsh & Nolan, for Appellant, submitted a brief; Mr. E. E. Enterline and Mr. C. B. Nolan argued the cause orally.*

Were the declarations of the conductor and the roadmaster admissible? Any attempt to set exact limitations to the rule of *res gestae* is futile. Cases may be found denying the right to introduce declarations made within a few seconds after the occurrence to which they relate; others justify their admission several hours thereafter, some excluding statements made anywhere except at the very place of the incidents to which they relate, others at situations quite far removed; some rejecting answers to inquiries as distinguished from voluntary ejaculations, others admitting monosyllabic replies to leading questions.

It is submitted that while there must be reasonable propinquity in place and time, this is important only as it is calculated to make the comment readily credible as the unstudied outburst of guileless mind, instinctively truthful. "The modern tendency with respect to what is admissible as *res gestae* is inclined to be more liberal than the early rule which was quite closely confined to those declarations occurring during the actual continuance of the main event." (11 Ency. of Evidence, 297, 298;

*Jack v. Mutual Reserve Fund Life Assn.*, 113 Fed. 49-56, 51 C. C. A. 36.) The appellant directs the attention of the court to some personal injury and death cases in which declarations of the servants of the defendants, made some considerable time after the injury, were held to be appropriate evidence. In *Walters v. Spokane Ry. Co.*, 58 Wash. 293, 108 Pac. 593, the statements of a conductor made about two hours after a derailment, in which two of his crew were killed, were held properly admitted. He told that the accident arose from the spreading of the rails, and that the track was in bad condition. In *Roberts v. Port Blakeley M. Co.*, 30 Wash. 25, 70 Pac. 111-113, the declarations of the general superintendent of a railroad, made about three hours after an accident, indicating that wheels of inferior character were used by the company occasioning the wreck, were held to have been properly admitted.

The declarations of a mine foreman made thirty minutes after an accident were held admissible in *New York & C. M. S. v. Rogers*, 11 Colo. 6, 7 Am. St. Rep. 198-200, 16 Pac. 719, 17 Morr. Min. Rep. 123. In *Dixon v. Northern Pac. Ry. Co.*, 37 Wash. 310, 107 Am. St. Rep. 810, 2 Ann. Cas. 620, 68 L. R. A. 895, 79 Pac. 943, the statement of a boy who was seriously injured by being run over by a railroad train, made about ten minutes after the accident occurred, to the effect that the brakeman had kicked him off, was held properly admitted. The same court in *Starr v. Aetna Life Ins. Co.*, 41 Wash. 199, 4 L. R. A. (n. s.) 636, 83 Pac. 113, sanctioned the admission of the statement of the victim of an accident made an hour after it occurred. Declarations made after a similar lapse of time were admitted and the ruling approved by the same court in *Lewis v. State*, 29 Tex. App. 201, 25 Am. St. Rep. 720, 15 S. W. 642. The case of *Missouri K. & T. Ry. Co. v. Vance* (Tex. Civ. App.), 41 S. W. 167, is of value in that the declarations there admitted related to the cause of the accident.

In *Rothrock v. Cedar Rapids*, 128 Iowa, 252, 103 N. W. 475, a half an hour elapsed between the occurrence and the declarations admitted which constituted all the evidence there was in the case as to the happening to support the verdict. (See, also,

*Johnson v. State*, 8 Wyo. 494, 58 Pac. 761; *State v. Horan*, 32 Minn. 394, 50 Am. Rep. 583, 20 N. W. 905.) In a number of the cases above referred to, the injured party, being the declarant, died shortly after of his injuries; that fact, though proper to be taken into consideration in determining the likelihood of the truthfulness of the statement, is of itself unimportant, however. (See 11 Ency. of Evidence, 333.)

Appellant was to all intents and purposes a passenger, whether technically so or not. As to that the authorities are in conflict, as will appear from 3 Thompson on Negligence, 2654, 2655. The following cases hold that so far as the question of the liability of the carrier is concerned, one occupying the position of the appellant at the time he was hurt has the status of a passenger. (*Doyle v. Fitchburg R. Co.*, 162 Mass. 66, 44 Am. St. Rep. 335, 25 L. R. A. 157, 37 N. E. 770; *Haas v. St. Louis & S. Ry. Co.*, 111 Mo. App. 706, 90 S. W. 1155; *Chattanooga R. T. Co. v. Venable*, 105 Tenn. 460, 51 L. R. A. 886, 58 S. W. 861; *Johnson v. Texas Central Ry. Co.*, 42 Tex. Civ. App. 604, 93 S. W. 433; *Harris v. City & E. G. R. Co.*, 69 W. Va. 65, Ann. Cas. 1912D, 59, 70 S. E. 859; *Gregory v. Granite R. Co.*, 132 Ga. 587, 64 S. E. 686; *Kilduff v. Boston E. Ry. Co.*, 195 Mass. 307, 9 L. R. A. (n. s.) 873, 81 N. E. 191; *Indianapolis Traction & T. Co. v. Romans*, 40 Ind. App. 184, 79 N. E. 1068; *Harris v. Puget Sound E. R. Co.*, 52 Wash. 299, 100 Pac. 841; *Hebert v. Portland R. Co.*, 103 Me. 315, 125 Am. St. Rep. 297, 13 Ann. Cas. 886, 69 Atl. 266; *Gray v. Columbia R. Co.*, 49 Or. 18, 88 Pac. 297; *Enos v. R. I. Suburban R. Co.*, 28 R. I. 297, 67 Atl. 5; *McNulty v. Pennsylvania R. Co.*, 182 Pa. 479, 61 Am. St. Rep. 721, 38 L. R. A. 376, 38 Atl. 524.)

The complaint in this cause is framed so as to invoke the federal Employers' Liability Act, by which the defense of fellow-servant is abolished. Some claim was made at the trial that the appellant did not come within the class of those who are or could be protected by a national law, but since the recent decisions of the supreme court of the United States under the Act in question, the subject is not open to controversy. (See *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 56 L. Ed. 327,

38 L. R. A. (n. s.) 44, 32 Sup. Ct. Rep. 169; *Zikos v. Oregon R. & N. Co.*, 179 Fed. 893.) A track worker was held entitled to recover under the Act in *Colasurdo v. Central R. R.*, 180 Fed. 832. The decision in this case was affirmed in 192 Fed. 901, 113 C. C. A. 379. A very marked difference of opinion concerning the scope of the Act in question prevails in the federal courts as shown in the opinion in *Darr v. Baltimore & O. R. Co.*, 197 Fed. 665, but none of the rulings would exclude the present case from its operation. In *Northern Pac. Ry. Co. v. Maerkl*, 198 Fed. 1, 117 C. C. A. 237, the circuit court of appeals again considered the statute, and held it applicable to a car repairer at work on a car used indiscriminately in interstate and in intrastate commerce.

*Messrs. Gunn, Rasch & Hall, Mr. O. F. Goddard, and Mr. E. T. Clark*, for Respondent, submitted a brief; *Mr. Carl Rasch* argued the cause orally.

The declarations of the conductor and the roadmaster were inadmissible. They were neither a part of the *res gestae* nor was there any showing made making them competent as admissions of an agent in the course of his employment and within the scope of his authority. It is settled law in this jurisdiction that: "To bind the principal, the declarations of an agent must be made within the scope of his authority, at the time of the transaction, and be a part of the *res gestae*. If made after the transaction is completed, they are in the nature of hearsay, and are mere narrations of a past transaction." (*Hogan v. Kelly*, 29 Mont. 485, 489, 75 Pac. 81; see, also, *Ryan v. Gilmer*, 2 Mont. 517, 25 Am. Rep. 744; *Poindexter & Orr etc. Co. v. Oregon S. L. R. Co.*, 33 Mont. 338, 340, 83 Pac. 886; *Durkee v. Central Pac. Ry. Co.*, 69 Cal. 533, 58 Am. Rep. 562, 11 Pac. 130; *Herman Waldeck & Co. v. Pacific Coast S. S. Co.*, 2 Cal. App. 167, 83 Pac. 158, 159; *Boone v. Oakland Transit Co.*, 139 Cal. 490, 73 Pac. 243; *Luman v. Golden etc. Min. Co.*, 140 Cal. 700, 74 Pac. 307; *Morse v. Consolidated Ry. Co.*, 81 Conn. 395, 71 Atl. 553; *Redmon v. Metropolitan St. R. Co.*, 185 Mo. 1, 105 Am. St. Rep. 558, 84 S. W. 26; *Cincinnati etc. Ry. Co. v. Martin*, 146 Ky. 260,

142 S. W. 410; *Parker v. Winona etc. Ry. Co.*, 83 Minn. 212, 86 N. W. 2; *Ft. Wayne etc. Traction Co. v. Crosby*, 169 Ind. 281, 14 Ann. Cas. 117, 13 L. R. A. (n. s.) 1214, 81 N. E. 474; *Clark v. Van Vleck*, 135 Iowa, 194, 112 N. W. 648; *Blackman v. West Jersey etc. R. Co.*, 68 N. J. L. 1, 52 Atl. 370.)

The federal Employers' Liability Act makes a common carrier by railroad, while engaging in commerce between the states, liable for injuries sustained by its employees while employed by such carrier in such commerce, but leaves unaffected, and as fully available as at common law, the defense of assumption of risk, except in cases "where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." The Act does not give a right of action against the carrier merely because of the infliction of an injury by reason of defective appliances, but only where such defects were "due to its negligence." The statute requires a showing by pleading and proof, not only that a defect existed which caused the injury, but that the defect was one due to defendant's want of proper care. An attempt to meet these requirements is made in the complaint, but having failed in the proof, the doctrine of *res ipsa loquitur* is invoked, and it is contended that the parting of the train of and by itself gives rise to a presumption that the appliances were defective, due to defendant's negligence. The rule, however, is well settled that "no presumption of negligence arises in cases of injuries from defective machinery or other appliances where the thing is not inherently dangerous." (29 Cyc. 595; *Edgens v. Gaffney Mfg. Co.*, 69 S. C. 529, 48 S. E. 538.) So that, even if the mere parting of the train afforded the basis for an inference that it was caused by a defective coupling or other appliance, there would still be the further presumption that the defendant had no notice of such defect, and as to that feature of the case neither the complaint states sufficient facts (*McEnaney v. Butte*, 43 Mont. 526, 117 Pac. 893; *Phillips v. Butte Jockey Club*, 46 Mont. 338, 127 Pac. 1011), nor was proof made, or offered to be made, to meet that presumption. There could be no liability, under conditions like the present, because of a defective appliance, caus-

ing the parting of the train, unless the carrier knew, or in the exercise of ordinary care should have known, of its existence. In such case the doctrine of *res ipsa loquitur* cannot be invoked and does not apply. (*Byers v. Carnegie Steel Co.*, 159 Fed. 347, 16 L. R. A. (n. s.) 214, 86 C. C. A. 347.)

It was held in the case last cited that the presumption does not arise, unless "the evidence excludes all other causes for the accident." Nor would proof of a defective appliance suffice. (*McGrath v. St. Louis Transit Co.*, 197 Mo. 97, 94 S. W. 872; *Moriarity v. Schwarzschild & Zulzberger Co.*, 132 Mo. App. 650, 112 S. W. 1034; *Hamilton v. Kansas City etc. R. Co.*, 123 Mo. App. 619, 100 S. W. 671; *St. Louis etc. Ry. Co. v. Cason* (Tex. Civ. App.), 129 S. W. 394.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action by the plaintiff for damages for personal injuries suffered by him during the course of his employment by the defendant. The accident occurred on September 20, 1909. The defendant owned and was operating a line of railway extending through the states of South Dakota, Wyoming and into and through portions of the state of Montana, and was engaged as a common carrier in interstate commerce. The plaintiff was in its employ as extra gang foreman, having under his charge a crew of laborers engaged in making repairs upon its tracks. He and the crew were required to occupy and live in outfit cars so that they could be readily moved from place to place as the exigencies of their service required. One of these cars was occupied by plaintiff and his wife. It was fitted up with a stove, bedding and other household furniture necessary to make it habitable. On the day of the accident the cars were being transferred from Dewey, South Dakota, to New Castle, Wyoming, so that the crew could effect repairs near the latter place. They were attached to the rear end of a freight train consisting of fifty-one cars. At a point about seven miles east of Dewey, while ascending a grade, the train parted, with the result that by the sudden stoppage occasioned by the automatic setting of the air-brakes, the

plaintiff was thrown violently back and against a box in the rear end of the car and thereby suffered the injuries complained of. It is alleged that the defendant was negligent in placing in the train a car equipped with a coupler which was unsafe, defective and insecure, in that the part thereof known as the lock-block had become worn and loose, a fact which was known to the defendant, or, by the exercise of ordinary diligence on its part, ought to have been known to it, but was not known to the plaintiff. The complaint then alleges:

"Sixth. That on the said 20th day of September, 1909, while said train was being moved by the defendant along and upon its said track and railroad from Dewey, South Dakota, to New Castle, Wyoming, at a rate of speed of about twenty miles per hour, the said coupler upon said car in said train by reason of its being defective, worn and insecure, and because the defendant carelessly and negligently failed and neglected to keep the same in good repair and in a safe and sound condition, and because of the negligent and careless operation of said train by said defendant, loosened and came apart causing the said train instantly to part, thereby breaking the air-hose of said train which controlled the brakes upon the cars. That the parting of said train and the breaking and separating of said air-hose caused the brakes upon the cars to which said outfit car was still attached, including the brakes on said outfit car, to become suddenly and violently set, thereby causing said train and cars last mentioned violently and suddenly to stop, whereby the said plaintiff was thrown with great force and violence backward a distance of about twelve feet along and in the interior of said car wherein he was then riding, against and upon a box in said car."

The answer denies all of the allegations of the complaint, except that it admits that at the time of the accident the defendant was engaged in interstate commerce. It alleges certain matters as affirmative defenses, upon which there was issue by reply. The issues presented on this branch of the case do not require notice. At the close of plaintiff's case, the court sustained a motion for nonsuit and directed judgment for the



defendant. This appeal is from the judgment. The two questions presented for decision are, whether the exclusion of certain evidence was error, and whether the evidence was sufficient to take the case to the jury.

1. During his examination in chief, counsel for plaintiff inquired of him whether he was acquainted with the duties of a conductor on the defendant's road. He was not permitted to answer. Counsel then offered to have him testify, in substance, that when such an accident as the one in question occurs it is the duty of a conductor to ascertain its cause, to restore the connection, if possible, and proceed with the train; to ascertain if any person has been injured, and, if so, also the nature and extent of the injury, and to make full report of the facts to his superior officers; that when the train parted, the conductor at once proceeded forward from the caboose where he then was, to ascertain the cause; that in passing the car in which plaintiff and his wife were he ascertained that plaintiff had been injured; that he then said that he was going forward to inquire the cause of the accident; that, the connection being restored, the train proceeded immediately to New Castle, arriving there thirty or forty minutes later; that the conductor then returned to the plaintiff's car and made inquiry as to the extent of the injury in order to make his report of it, and that during the course of the inquiry, in response to a question by plaintiff as to the cause of the accident, he said that the train had parted "because of a defective coupler; a worn lock-block." An offer was also made to show by this witness that a similar duty to investigate and make report is required of a roadmaster; that when the train arrived at New Castle, defendant's roadmaster came to plaintiff's car and, after inquiry as to the nature and extent of the injury, wrote out his report; and that while so doing he stated to plaintiff that the parting of the train was caused by a "defective coupling; a worn lock-block." This evidence was excluded on the ground that the declarations were not part of the *res gestae*, and were therefore incompetent.

The statute provides that where "the declaration, act or omission forms part of a transaction, which is itself the fact in dis-

pute, or evidence of that fact, such declaration, act or omission is evidence, as part of the transaction." (Rev. Codes, sec. 7867.) This provision was not intended to embody the statement of a rule by which to determine the competency of such declarations as those in question, but to be a mere direction that they must be deemed competent when they are so connected with the main transaction as to form a part of it. It states one of the exceptions to the general rule recognized by all the courts in common-law jurisdictions which requires the exclusion of hearsay statements, viz.: that when declarations by the participant in or an observer of the litigated act are so nearly connected with it in point of time that they may be regarded as a spontaneous, necessary incident, explaining and characterizing it, they may be proved as a part of it without calling the person who made [1] them. The principle upon which the exception is founded is that the declarations were made while the mind of the speaker was laboring under the excitement aroused by the incident, before there was time to reflect and fabricate, and hence the solemnity of the oath is not necessary to give it probative value. Such statements need not be strictly contemporaneous with the main incident. They may be in the form of narrative; yet if the circumstances show they were made while the excitement produced by the incident still dominated the mind and was the producing cause, they are nevertheless part of the main incident and competent. On the contrary, if they are in fact mere narrative, they are not competent. In *State v. McDaniel*, 68 S. C. 304, 102 Am. St. Rep. 661, 47 S. E. 384, the court said: "If the declarations are a mere narration of a past occurrence they are not admissible as *res gestae*. When the declarations are not precisely concurrent with the transaction, a delicate and complex question is presented to the trial judge in determining their admissibility, and each case must be decided upon its own circumstances. In the nature of the case, there can be no hard-and-fast rule as to the precise time near an occurrence within which declarations explanatory thereof must be made in order to be admissible. The general rule is that the declarations must be substantially contemporaneous with the litigated transaction and

be the instinctive, spontaneous utterances of the mind while under the active, immediate influence of the transaction, the circumstances precluding the idea that the utterances are the result of reflection or design to make false or self-serving declarations.

\* \* \* Questions of this kind must be very largely left to the sound judicial discretion of the trial judge, who is compelled to view all the circumstances in reaching his conclusion, and this court will not reverse his ruling, unless it clearly appears from undisputed circumstances in evidence that the testimony ought to have been admitted or rejected, as the case may be." The tendency of recent decisions is to relax the rule of admissibility rather than to restrict it, and to consider the weight to which the evidence is entitled. (*Jack v. Mutual Reserve Fund Assn.*, 113 Fed. 49, 51 C. C. A. 36, and cases cited.) Accordingly, this court in *State v. Tighe*, 27 Mont. 327, 71 Pac. 3, held that, as in case of confessions, it is the province of the trial judge to determine *in limine* the admissibility of declarations and leave the question of their weight to the jury, in view of the circumstances under which they were made. This must necessarily be the case whenever a question of fact arises upon conflicting evidence as to whether they are part of the *res gestae*, or depends upon contradictory inferences either of which may fairly be drawn from [2] uncontradicted evidence; and since this is so, the solution of the question of the admissibility of such evidence must in every case be left largely to the sound legal discretion of the trial court, subject to review only in cases of manifest abuse. (3 Wigmore on Evidence, sec. 1750; *State v. McDaniel*, *supra*; *Walters v. Spokane International R. Co.*, 58 Wash. 293, 108 Pac. 593.)

Even under this liberal rule, however, we do not think the [3] declarations admissible on the theory that they were prompted by the excitement produced by the accident itself. The conductor did not return to plaintiff's car until the train had reached New Castle, some half hour or more after the accident. Apparently, he would not have spoken on the subject at all if he had not been questioned by the plaintiff. His statement assumed the form of narrative, rather than that of a spontaneous

utterance as a necessary incident of the accident itself explaining and characterizing it. The roadmaster did not witness the accident but learned of it after the train had reached New Castle. His statement, therefore, could not have been due to any excitement aroused by his witnessing the accident or his presence when it occurred. But we think the evidence competent upon another theory, *viz.*, as admissions by the agents of the defendant within the scope of their employment while engaged in the discharge of their duties. Whether it was in fact among the duties of these employees to ascertain the cause of the accident and the nature and extent of any injury caused by it and make report to their superior officers, we need not stop to inquire. The plaintiff offered to show that this was so. If such was the case, the statements were made while these employees were in the discharge of their duties. Now, it is a well-settled rule that when an agent is vested with authority to perform any act for his principal, his words—his verbal acts—while engaged in that business, are a part of the *res gestae* of that business. They are therefore the words and acts of the principal and may be proved against him. (*Hogan v. Kelly*, 29 Mont. 485, 75 Pac. 81; *Hupfer v. National Distilling Co.*, 119 Wis. 417, 96 N. W. 809; *Hyvonen v. Hector Iron Co.*, 103 Minn. 331, 123 Am. St. Rep. 332, 115 N. W. 167; *Turner v. Turner*, 123 Ga. 5, 107 Am. St. Rep. 76, 50 S. E. 969; *Lynchburg Tel. Co. v. Booker*, 103 Va. 594, 50 S. E. 148; *Baker v. Westmoreland etc. Gas Co.*, 157 Pa. 593, 27 Atl. 789; *Anderson v. Great Northern Ry. Co.*, 15 Idaho, 513, 99 Pac. 91; *Leach v. Oregon S. L. R. Co.*, 29 Utah, 265, 110 Am. St. Rep. 708, 81 Pac. 90; *Redmon v. Metropolitan St. Ry. Co.*, 185 Mo. 1, 105 Am. St. Rep. 558, 84 S. W. 26; *McNicholas v. New England T. & T. Co.*, 196 Mass. 138, 81 N. E. 889.) For the time being the agent is the *alter ego* of the principal, and while he is not employed to talk about the business of his principal or to admit away the rights of the latter, declarations and admissions by him touching the business in hand *dum fervet opus*, are those of the principal. "This rule is especially applicable to corporations, which can speak and act only through agents. Justice to the rights of others requires

that acts of such intangible entities must be significant, and the basis for conduct by others as in the case of individuals. When, therefore, a corporation selects an individual to do an act in its behalf, the individual, in doing that act, i. e., within the scope of his authority, is, in legal effect, the corporation." (*Hupfer v. National Distilling Co.*, *supra*.) If, however, the appointed work has been completed, any statement made by the agent with reference to it is, under all the authorities (2 Chamberlayne's Law of Evidence, sec. 1346), a mere narrative of a past transaction and is not admissible under the *res gestae* rule. It is, as to the principal, mere hearsay.

Counsel for defendant cite and rely on the cases of *Ryan v. Gilmer*, 2 Mont. 517, 25 Am. Rep. 744, and *Poindexter & Orr L. S. Co. v. Oregon Short L. R. Co.*, 33 Mont. 338, 83 Pac. 886. In the latter of these cases the person whose declaration was held incompetent was not the agent of the corporation to do the act with reference to which the declaration in question was made. With reference to the former, it may be noted that the admission held incompetent was made by the driver of a vehicle immediately after it had been overturned, the accident resulting in injury to a passenger, and while the driver was still in charge of it. Under the more liberal rule observed by many of the courts, the evidence was competent. The case serves only to illustrate the difficulty the courts have experienced in ascertaining and declaring any definite rule by which to determine whether the admission under consideration was or was not made while the agent was acting within the scope of his authority. It is not in point, because, as we have shown, the declarations in question here were made while the conductor and roadmaster were in the actual discharge of the duties delegated to them. The exclusion of the evidence was error.

2. Counsel contend that inasmuch as the parting of a train is not an ordinary occurrence in the operation of railroads, the fact that such an accident occurred in this instance, there being no explanation of the cause of it, was sufficient to raise a presumption of negligence by the defendant or some of its servants, and therefore that a case was made for the jury without regard

to the excluded evidence. They insist upon two propositions, either of which, if accepted as sound, they say, will require a reversal of the judgment in this case, *viz.*: (1) That plaintiff for the time being occupied the position of a passenger; hence the presumption of negligence arising from the happening of the accident made out a *prima facie* case; (2) that the reason for indulging this presumption in favor of a passenger and not in favor of a servant is that an accident may be due as well to the negligence of a fellow-servant as to the lapse of duty by the carrier with reference to some nondelegable duty; that this action was brought under the federal Employers' Liability Act (25 Stats. at Large, 65, 1909 Supp. Fed. Stat. Ann., p. 584), which cuts off the defense of negligence by a fellow-servant; and that, since this is so, logically the same presumption must be indulged in favor of the servant as in favor of the passenger. We shall not undertake to determine at this time whether these contentions are maintainable. We think both of them involve questions which are at least debatable. Upon the presumption that the plaintiff proved his case according to his offer, however, we think he was entitled to go to the jury without regard to the theory advanced by counsel in either of these contentions.

For present purposes we shall assume that it is settled law that in an action by a servant against his employer for an injury caused by the negligence of the latter, proof of the accident alone does not furnish a basis for an inference of culpable [4] negligence, but that the servant must go further and show by direct proof, or by circumstances, that his injury sprang wholly or partly from some omission of duty by his employer. If he fails to do this he has failed to make a case for the jury. If, however, in proving the injury, the facts and circumstances disclosed tend to show that the instrumentality which caused the injury was exclusively in the control of the employer and the injury occurred by reason of some defect therein, the existence of which is attributable to a negligent omission of duty by the employer rather than to any other cause, he has made a case justifying a presumption of culpable negligence. The burden then devolves upon the employer to rebut the presumption, by

explaining the circumstances so as to render their existence consistent with the exercise of due care. The general rule applicable to this class of cases, viz.: that the plaintiff must prove negligence, is qualified by way of exception by what is termed the doctrine of *res ipsa loquitur*, which means merely that the circumstances under which the accident occurred charge the defendant with culpable negligence. In *Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29, the rule is stated thus: "Of course, the general rule of law is that negligence is not inferable from the mere occurrence of the accident; but to this rule is the well-understood exception that, where the thing which causes the injury is shown to be under the management and control of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have such management and control use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from the want of ordinary care by the defendant. (1 Shearman & Redfield on Negligence, sec. 59.) Under such circumstances proof of the happening of the event raises a presumption of the defendant's negligence, and casts upon the defendant the burden of showing that ordinary care was exercised. This rule has been invoked in numerous similar cases." The train upon [5] which plaintiff was riding was under the control and management of the defendant. The defendant knew, or ought to have known, by whom it was made up, how it was made up, how it was equipped and what degree of care had been exercised in making it safe to run. The duty to see that it was properly equipped was a primary, nondelegable duty of defendant. It separated because of a "defective coupler or worn lock-block." Ordinarily, when a train is equipped with couplers which are sound and suitable for use, it does not part. Therefore, the fact that one of those in use at the time of the accident was defective and worn to such an extent as to permit the train to part, points to neglect by defendant to perform a primary duty rather than to any other cause, and properly calls for explanation. In the absence of such explanation the jury would be justified in holding it responsible for the accident and the

injury resulting from it. (*Griffin v. Boston & Albany R. Co.*, 148 Mass. 143, 12 Am. St. Rep. 526, 1 L. R. A. 698, 19 N. E. 166, and cases cited.)

The judgment is reversed and the cause remanded for a new trial.

*Reversed and remanded.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

NILSON, RESPONDENT, v. CITY OF KALISPELL, APPELLANT.

(No. 3,282.)

(Submitted April 18, 1913. Decided May 17, 1913.)

[132 Pac. 1133.]

*Personal Injuries—Cities and Towns—Defective Streets—Presumptions—Contributory Negligence—Instructions—Theory of Case—Excessive Verdict.*

**Personal Injuries—Cities and Towns—Contributory Negligence—Complaint—Sufficiency.**

1. The complaint in an action against a city, charging that the proximate cause of plaintiff's injuries was defendant's negligence in leaving unguarded an excavation in one of its streets into which he fell, was not open to attack on the ground that though it appeared from the allegations therein that the accident was due to his own act, it failed to state facts exculpating him from the imputation of contributory negligence in acting as he did.

**Same—Instructions—Theory of Case—Binding on Appeal.**

2. Defendant city having acquiesced in the giving of an instruction that as contributory negligence had not been pleaded or shown by the evidence of either party, plaintiff must be assumed to have used the street in a proper manner and without negligence, was bound by the theory of the case thus adopted, and was not in position to urge a reversal of the judgment on the alleged ground that the evidence showed contributory negligence on plaintiff's part.

**Same—Contributory Negligence—Jury Question.**

3. Whether the city had exercised reasonable care to keep the street in a condition for use by providing a safe driveway twelve or fourteen feet wide in the middle of the street, into an excavation in which plaintiff fell while riding a bicycle, *held* a jury question.

**Same—Contributory Negligence—Presupposes Negligence on Part of Defendant.**

4. A charge made by defendant that plaintiff was guilty of contributory negligence in using the street the way he did when he was injured presupposes actionable negligence on the part of the city.



**Same—Streets—Safety—Presumptions.**

5. Though a traveler on a city street may not close his eyes to an obvious danger, he is not obliged to make a special effort to discover defects; he may presume that the thoroughfare is in an ordinarily safe condition.

**Same—Contributory Negligence—Appeal.**

6. In the absence of anything indicating such an inherent improbability in the evidence of plaintiff as to deny it credibility, and in view of the verdict of the jury in his favor and the action of the trial court in passing upon defendant's motion for a new trial, the supreme court will not say that plaintiff should not have recovered because he was shown to have been negligent as a matter of law.

**Same—Excessive Verdict—Review.**

7. Verdict for \$3,500 for personal injuries to plaintiff, a skilled mechanic of the age of forty-four years of age, who, at the time of the accident, was earning from \$160 to \$175 per month, and for nine months thereafter was under a physician's care, for six or seven months of which time he had not been able to earn anything, whose earning capacity up to the time of the trial had been reduced about \$100 per month, and who had incurred doctor's and hospital bills for about \$375, held not excessive.

*Appeal from District Court, Flathead County; J. E. Erickson, Judge.*

ACTION by C. N. Nilson against the city of Kalispell. Judgment for plaintiff. Defendant appeals from the judgment and an order denying its motion for a new trial. Affirmed.

Cause submitted on briefs of counsel.

*Mr. J. R. Wine, Jr., and Mr. W. B. Rhoades, for Appellant.*

Where plaintiff's own act is the proximate cause of his injury, he must allege and prove facts showing that he was free from negligence. Under this rule, the trial court should have sustained defendant's demurrer herein. (*Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21; *Badovinac v. Northern Pac. Ry. Co.*, 39 Mont. 454, 104 Pac. 543; *Lynes v. Northern Pac. Ry. Co.*, 43 Mont. 317, Ann. Cas. 1912C, 183, 117 Pac. 81.)

Passing from the proposition of contributory negligence and proximate cause as merely a question of pleading, we call attention to the authorities dealing with this question as a matter of substantive law. It is appellant's contention that respondent was guilty of such gross and inexcusable negligence in leaving the usually traveled highway twelve feet in width and riding

into the trench, that the trial court should have held as a matter of law that he could not recover. (See Thompson on Negligence, secs. 44, 6235; *Meehan v. Great N. Ry. Co.*, 43 Mont. 72, 114 Pac. 781.)

As particularly applicable to the facts in this case, we cite *Zvanovich v. Gagnon & Co.*, 45 Mont. 180, 122 Pac. 272, to show that plaintiff was guilty of such contributory negligence that he should have been nonsuited. (See, also, Elliott on Roads and Streets, secs. 187, 189; *Lerner v. Philadelphia*, 221 Pa. 294, 21 L. R. A. (n. s.) 614, 70 Atl. 755.)

Travelers upon streets have to use all reasonable care and caution to avoid danger; they cannot carelessly run into danger and then make others pay for their negligence. (*Pierce v. City of Wilmington*, 2 Marv. (Del.) 306, 43 Atl. 162; *Carswell v. City of Wilmington*, 2 Marv. (Del.) 360, 43 Atl. 169; *Cohn v. Kansas City*, 108 Mo. 387, 18 S. W. 973; *Cooper v. City of Dallas*, 83 Tex. 239, 29 Am. St. Rep. 645, 18 S. W. 565.)

While a city owes its citizens the duty to keep its highways safe for a person to pass over, the citizen owes to it the duty to use his senses and not run into obstructions he is familiar with, or which, with the exercise of ordinary care, he could discover and easily avoid. (*Jackson v. Kansas City*, 106 Mo. App. 52, 79 S. W. 1174.) Although a traveler on a public street has the right to assume that the sidewalk is in a safe condition and is not required to anticipate danger, he is not excused from the exercise of his faculties; and when reasonable attention on his part would enable him to avoid an open and obvious danger, he cannot recover if he has neglected to exercise that ordinary and reasonable care which is expected and required of everyone. (*Osborne v. Pulaski Light & Water Co.*, 95 Va. 16, 27 S. E. 812.)

A person in full possession of his faculties, passing over a street or sidewalk in daylight, with no crowd to jostle or disturb him, no intervening obstacles to obscure sudden danger, and no sudden occurring cause to distract his attention, is under obligation to use his eyes to direct his footsteps; if he does not do so, he is negligent; and if under such circumstances he falls into a hole, he cannot recover for the injuries sustained. (*Kewanee v.*

*Depew*, 80 Ill. 119; *Robb v. Connellsville Borough*, 137 Pa. 42, 20 Atl. 564.) And it is the duty of the traveler passing along a street to see and observe any dangerous places in the street, and if he is guilty of negligence in stepping on a dangerous place, which contributed to his injury caused thereby, he cannot recover. (*Tucker v. Salt Lake*, 10 Utah, 173, 37 Pac. 261.) A person walking along a public street is bound to use his faculties for observation in an ordinary and reasonable way, proportionate to the dangers to be apprehended from the time, place and existing conditions. (*Valparaiso v. Schwerdt*, 40 Ind. App. 608, 82 N. E. 923; *Robb v. Connellsville Borough*, 137 Pa. 42, 20 Atl. 564.)

*Messrs. Logan & Child*, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On the evening of November 4, 1910, while plaintiff was riding a bicycle along First street, in the city of Kalispell, he ran into an unguarded excavation, was thrown to the ground and injured. He brought this action and recovered a judgment for \$3,500. The city has appealed from the judgment and from an order denying it a new trial.

There is presented to us a record of more than eighty pages, which does not contain a single exception reserved by either party. The appellant contends: (a) That the complaint does not state a cause of action; (b) that the evidence shows that plaintiff was guilty of contributory negligence as a matter of law; and (c) that the verdict is excessive.

1. The complaint is attacked because it fails to state facts exculpating plaintiff from the imputation of contributory negligence which it is claimed necessarily flows from the allegations detailing the facts of the injury. The complaint describes the excavation in the street; charges the city with knowledge and with negligence in failing to provide warning signals and then—to make a brief summary—alleges that while plaintiff was riding along this street in the night-time, without knowledge of

any obstruction, he ran into this excavation, was thrown to the ground and injured.

Counsel for appellant invoke the rule applied in *Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21, *Badovinac v. Northern Pac. Ry. Co.*, 39 Mont. 454, 104 Pac. 543, and *Lynes v. Northern Pac. Ry. Co.*, 43 Mont. 317, Ann. Cas. 1912C, 183, 117 Pac. 81. In each of those cases the plaintiff alleged in his complaint that he jumped from a moving vehicle and sustained the injury of which he complained. This court held in each instance "that where plaintiff's own act is a proximate cause of his injury, he must allege and prove that in doing the particular act he was moved by those considerations for his own safety which would actuate a reasonably prudent person, similarly situated, to do as he did." But the rule of those cases has no application here. As pointed out in the recent decision in *Hollenback v. Stone & Webster Engineering Corp.*, 46 Mont. 559, 129 Pac. 1058, the rule above referred to applies only to a complaint which shows affirmatively that the proximate cause of plaintiff's injury was his own act. This complaint charges that the negligence of the city in leaving the excavation unguarded was the proximate cause of plaintiff's injury, and for this reason it is not open to the attack made upon it.

2. Does the evidence show contributory negligence on plaintiff's part as a matter of law? Waiving the question of the [2] city's right to have this determined under the specifications made, and in the light of the fact that certain exhibits used upon the trial are not before us, and it is therefore extremely difficult to understand much of the evidence, and we have presented about the following facts: Plaintiff and one Anderson, each riding a bicycle, were traveling on First street in Kalispell, going toward the business section of the city a few minutes after 6 o'clock on the evening of November 4, 1910; when they reached the intersection of First street and Second avenue east, Nilson, who was riding a few feet to one side of the center of the street and six or eight feet in advance of Anderson, ran into an excavation from three to six inches deep, made in the street by a contractor for the city in laying a concrete sidewalk; the excavation

was unguarded; there was a street light of some character—probably an arc-light—on one corner of the intersection of these streets, but notwithstanding this fact neither plaintiff nor Anderson saw the excavation or knew of its existence until Nilson fell; it was dark; the sun set about 4:58 P. M. on that day and twilight disappeared about 5:30; it was so dark at the point where plaintiff fell that the character of the wounds on his head and face could not be determined until he was removed into the light; the street light was not burning brightly some two hours after the accident; the condition of the street had been the same for some considerable time; the work was being done under contract with the city. There is evidence given on behalf of the city which is in conflict with plaintiff's version, but the trial court instructed the jury that "in this case, contributory negligence has not been pleaded, nor has there been any evidence offered by the defendant showing or tending to show contributory negligence on the part of the plaintiff and in the absence of any proof to the contrary, you are bound to assume that the plaintiff was using the street as a highway in a proper manner and without negligence, unless the proof offered by him shows that he was himself negligent in the use of the highway." There was no exception saved to this portion of the charge, and the city is now bound by that theory of the case.

It is no argument at all to say that if plaintiff had traveled in the middle of the street he would not have been injured, for there was a safe driveway about twelve feet wide provided in that part of the street. The most favorable view for appellant [3] which can be entertained under the circumstances is that it was a question for the jury whether the city had exercised reasonable care to keep the street in a condition for use, by providing a safe driveway twelve or fourteen feet wide. (*Meisner v. City of Dillon*, 29 Mont. 116, 74 Pac. 130.)

The very charge now made by the city that the plaintiff was guilty of contributory negligence presupposes actionable negligence on the city's part. (*Birsch v. Citizens' Electric Co.*, 36 Mont. 574, 93 Pac. 940; *Wastl v. Montana Union Ry. Co.*,

24 Mont. 159, 61 Pac. 9.) Of course, if plaintiff's attention had been attracted to the excavation before he reached it, he probably would not have been injured; but his attention was not attracted to it, even though he was looking directly ahead when he ran into the excavation and the city failed to display any signals of the danger. While plaintiff could not close his eyes to any [5] obvious danger, he was not required to devote his time and attention to an effort to discover defects in the street. The rule applicable is well stated in *McCabe v. City of Butte*, 46 Mont. 65, 125 Pac. 133, as follows: "A traveler upon a public street has the right to presume that it is in an ordinarily safe condition, because the law enjoins upon the authorities of the municipality the duty to exercise ordinary diligence to make and keep the streets in a reasonably safe condition for public travel; and when they are rendered unsafe by reason of repairs being made therein, or have become defective or unsafe from any cause, and the authorities have notice of the condition or the circumstances are such as to warrant a presumption of notice, the duty to warn the public by lights or other means, while repairs are made, also arises. The traveler is not bound to make investigations, and he cannot be charged with negligence if he fails to do so." (See, also, 5 Thompson on Negligence, sec. 6238.)

The instructions fairly presented to the jury the duty imposed upon plaintiff as well as the rights and liabilities of the city. [6] Under the facts and circumstances as thus presented by this defective record, we are entirely unwilling to say that the plaintiff is shown to have been negligent as a matter of law. The best that can be said of the evidence is, that it presents a proper case for the jury. The jurors were the judges of the credibility of plaintiff and his other witnesses. The plaintiff's story was accepted as true by the jury and by the trial court in passing upon the motion for a new trial. In the absence of anything indicating such inherent improbability in the story as to deny its credibility, we are not disposed to question the truth of his statements. (*Lehane v. Butte El. Ry. Co.*, 37 Mont. 564, 97 Pac. 1038.)

The facts of this case are not at all similar to those considered in *Zvanovich v. Gagnon & Co.*, 45 Mont. 180, 122 Pac. 272.

3. Finally, appellant insists that the verdict is excessive. We shall not undertake to give even a summary of the evidence. There is not any fixed standard by which to measure the money compensation for a personal injury. In every instance where the elements of pain and suffering enter into consideration, much must be left to the enlightened judgment and common sense of the jurors. In *Bourke v. Butte El. Ry. Co.*, 33 Mont. 267, 83 Pac. 470, this court said: "However, the elements of physical and mental pain and suffering are entirely uncertain and no fixed standard can be established for ascertaining the damages occasioned by them. The amount must, of necessity, rest in the sound discretion of the jury, and courts are very reluctant to interfere with the verdict upon the ground that it is excessive or insufficient. The parties are entitled to a verdict from the jury, and courts ought not to substitute their judgments for those of juries, except in those exceptional cases where it manifestly appears that the jurors made a mistake in calculation, considered an item or items of damages which should not have been considered or abused that sound discretion which by law is vested in them." Again, in *Hollenback v. Stone & Webster Engineering Corp.*, above, it was said: "If it is possible from the evidence in this record to account for the amount of the verdict, then this court ought not to interfere. \* \* \*

Under the statute, the amount of the verdict must, of necessity, rest in the sound discretion of the jury. The parties are entitled to a verdict from the jury; and it is only in rare instances that the court is justified in interfering, unless the record discloses that the elements of passion and prejudice have influenced the minds of the jurors in arriving at the result."

At the time of his injury, plaintiff was an able-bodied man, forty-four years of age, with a life expectancy of about twenty-five years. He was apparently a skilled mechanic—a wood-worker by occupation—capable of earning, and actually earning, from \$160 to \$175 per month. For the first nine months after the injury he was under the doctor's care and for six

or seven months of that time he was not able to earn anything and for the next eleven months, up to the time of the trial, his earning capacity was reduced more than \$100 per month. He incurred doctors' bills for about \$300 and a hospital bill of from \$50 to \$75. The jury had the opportunity to observe something of plaintiff's condition at the time of the trial, more than eighteen months after he received his injuries. They heard his story and the testimony of the physicians, and returned a verdict for \$3,500. Three-fourths of this amount can be accounted for without taking into consideration plaintiff's pain or suffering or his impaired earning capacity after the date of the trial. Under these circumstances it cannot be seriously urged that the verdict is excessive.

The judgment and order are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

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STATE, RESPONDENT, v. WHITWORTH, APPELLANT.

(No. 3,296.)

(Submitted April 19, 1913. Decided May 21, 1913.)

[133 Pac. 364.]

*Criminal Law — Homicide—Self-defense—Threats—Admissibility in Evidence — Cross-examination — Appeal and Error — Technicalities.*

Criminal Law—Appeal and Error—Technicalities.

1. Under the rule that in the disposition of appeals the supreme court will be controlled by considerations of substance and not mere technicality, only assignments of error in a criminal cause by which some substantial right of appellant appears to have been erroneously and prejudicially affected will be reviewed.

Same—Homicide—Self-defense—Cross-examination.

2. In a prosecution for homicide which accused sought to justify under a plea of self-defense, cross-examination of a brother of deceased, relative to a conversation had with him by one of the state's witnesses, bearing upon the truth of the latter's account of a meeting between defendant and deceased a few days before the killing, and



touching the attitude of himself and deceased as one of hostility to appellant prior to and at the time of the affray as well as his own *animus* as a witness, *held* to have been improperly excluded.

**Same—Threats—Admissibility in Evidence.**

3. Evidence of threats by deceased, directed to but made out of the presence of defendant, was relevant and improperly excluded, where there was a controversy as to who was the aggressor, as to whether there was on the part of deceased an overt act or demonstration sufficient to induce a reasonable fear in the defendant for his personal safety, and as to whether he killed the deceased under the influence of such fear alone.

**Same.**

4. The fact that prior threats were vague, indefinite and conditional upon catching the person against whom they were directed, in doing a certain act, was no bar to their admissibility, even though the condition did not happen.

*Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.*

WALTER WHITWORTH, convicted of murder in the second degree, appeals from the judgment of conviction and from an order denying him a new trial. Reversed and remanded.

Mr. Edward Horsky, for Appellant, submitted a brief and argued the cause orally.

The court's announcement of the law as to threats, a previous assault, etc., were wholly erroneous. (*State v. Shadwell*, 26 Mont. 52, 56, 66 Pac. 508; s. c., 22 Mont. 59, 57 Pac. 281; *State v. Felker*, 27 Mont. 451, 460, 461, 71 Pac. 668; *State v. Hanlon*, 38 Mont. 557, 100 Pac. 1035.) And these errors were not cured by any instruction to the jury to disregard either the court's or county attorney's remarks, if such error were curable.

Remarks by the trial judge, in the presence of the jury, during the progress of trial, calculated to mislead the jury as to the law governing the case constitute reversible error. (*Southwestern Tel. etc. Co. v. Myane*, 86 Ark. 548, 111 S. W. 987; *Illinois Cent. R. Co. v. Souders*, 178 Ill. 585, 53 N. E. 408; *Brinckerhoff v. Briggs*, 92 Ill. App. 537; *Shippen Bros. Lumber Co. v. Gates*, 136 Ga. 37, 70 S. E. 672.)

Throughout the entire trial, the cross-examination of defendant's counsel was unduly restricted. In the trial of capital cases particularly, some latitude, if not liberality, should be permitted;

at least as much as in a civil case. The court was seemingly unaware or unmindful of the decisions of our supreme court, as well as of the provisions of section 8021, Revised Codes, which changes the rule of common law; for apparently he was under the impression that in cross-examination, it was his prerogative to hold counsel to strictness, whereas the decisions uniformly hold that under such a statute as ours, liberality is the rule. (*Cobban v. Hecklen*, 27 Mont. 245, 257, 70 Pac. 805; *Kipp v. Silverman*, 25 Mont. 296, 64 Pac. 884; *State v. Beesskove*, 34 Mont. 41, 53, 85 Pac. 376.)

Threats: In *State v. Sloan*, 22 Mont. 293, 56 Pac. 364, the court said that any declaration which indicates, however vaguely and indefinitely, an intention on the part of the deceased to inflict violence upon the defendant is admissible as a threat. In 21 Cyc. 965, the same rule is stated. The trial court held that "uncommunicated threats are inadmissible." But this court in at least three cases had long since held otherwise. (See *State v. Shadwell*, 26 Mont. 52, 56, 66 Pac. 508; *State v. Felker*, 27 Mont. 451, 460, 71 Pac. 668; *State v. Hanlon*, 38 Mont. 557, 100 Pac. 1035.)

Instructions from employer, and nature of controversy: "Evidence as to the defendant's rights in the land in dispute is admissible to show his good faith in the fatal difficulty for the purpose of mitigating his punishment. Where the punishment is largely in the discretion of the jury 'they should be placed as far as possible in the situation of the parties.'" (*Utterback v. Commonwealth*, 105 Ky. 723, 88 Am. St. Rep. 328, 49 S. W. 479; see, also, 6 Ency. of Evidence, 626, 627.)

Declarations of defendant: Under the rules of *res gestae* and the case of *State v. Tighe*, 27 Mont. 327, 71 Pac. 3, the acts of defendant soon after the shooting, the occasion therefor, and the declarations, etc., should have been received in evidence.

Decedent's habit of carrying weapons: "On a plea of self-defense, it is always relevant for the accused to show that the deceased was in the habit of carrying weapons, or that he had the reputation of being habitually armed." (Wharton's Criminal Evidence, sec. 927; *Naugher v. State*, 116 Ala. 463, 23 South.

26; *Daniel v. State*, 103 Ga. 202, 29 S. E. 767; *State v. Graham*, 61 Iowa, 608, 16 N. W. 743; *Riley v. Commonwealth*, 94 Ky. 266, 22 S. W. 222; *King v. State*, 65 Miss. 576, 7 Am. St. Rep. 681, 5 South. 97; *State v. Yokum*, 14 S. D. 84, 79 N. W. 389; *Glenewinkel v. State* (Tex Cr. App.), 61 S. W. 123; *State v. Crawford*, 31 Wash. 260, 71 Pac. 1030.)

Mitigation of punishment and disproof of malice: Where the jury is given a certain discretion in fixing the punishment of the defendant in case of conviction, evidence, though otherwise incompetent, may be admissible to mitigate the punishment. Section 9329 *et seq.*, Revised Codes, empowers the jury to assess the punishment. The effect of these statutes is to render evidence of mitigating circumstances admissible, which would have been inadmissible or unavailing at the common law. (*Fletcher v. People*, 117 Ill. 184, 7 N. E. 80; *Nowacryk v. People*, 139 Ill. 336, 28 N. E. 961; *Fields v. State*, 47 Ala. 603, 11 Am. Rep. 771.)

*Mr. D. M. Kelly*, Attorney General, and *Mr. Louis P. Donovan*, Assistant Attorney General, for Respondent, submitted a brief; *Mr. Donovan* argued the cause orally.

Since the evidence of threats would be admissible only in the event that the issue of self-defense was raised, the court could properly prevent counsel from making a statement concerning such previous threats by the deceased until he had first made a statement of facts showing that evidence of the threats would be admissible. (6 Ency. of Evidence, 789-792, and cases cited.) While counsel took an exception to the remarks of the court, he did not state that his exception was based upon the ground that the remarks of the court were improperly made in the presence of the jury. He should not now be permitted to urge an alleged error which was not specifically pointed out to the trial court. (*State v. Tully*, 31 Mont. 365, 73 Ann. Cas. 824, 78 Pac. 760; *State v. Biggerstaff*, 17 Mont. 510, 43 Pac. 709.) So far as the remarks of the county attorney are concerned, they do not constitute reversible error for three reasons,—(a) the objections are well founded (6 Ency. of Evidence, 789-792); (b)

there was no request by the defendant that the jury be instructed by the court to disregard these interruptions by the county attorney (*State v. Biggerstaff, supra*); and (c) it does not appear that the defendant was prejudiced thereby. (*People v. Amer*, 8 Cal. App. 137, 96 Pac. 401.)

**Threats:** The statement of the deceased to Blomberg, as contained in the defendant's offer of proof, was a mere narration by the deceased of a past event, and not a threat. (6 Ency. of Evidence, 784.) Furthermore, there was not any ruling upon the offer of proof, nor any exception taken thereto; hence there is nothing for the supreme court to review. (*State v. Biggs*, 45 Mont. 400, 123 Pac. 410; 2 Cyc. 722.) Blomberg later testified to the whole conversation regarding which this question was asked. The defendant, therefore, suffered no prejudice. (*State v. Van*, 44 Mont. 374.)

The alleged threat contained in the Dagen offer of proof was conditional upon catching the person in the act of herding cattle off the land—a condition which does not appear to have happened—and consequently the alleged threat was not admissible in evidence for any purpose. (6 Ency. of Evidence, 785; *Harbour v. State*, 140 Ala. 103, 37 South. 330.)

The remarks of the court regarding the inadmissibility of uncommunicated threats were made in excluding certain letters that were plainly inadmissible, for the reason that they were hearsay and irrelevant. Since the ruling of the court in excluding these letters was correct, it is immaterial that the court may have given a wrong reason therefor, or may have indulged in conversation irrelevant to the ruling. (*McCauley v. Jones*, 35 Mont. 32, 88 Pac. 572.)

**Decedent's habit of carrying weapons:** There is no evidence in the transcript tending to show that the defendant had any knowledge of any habit on the part of the decedent of carrying weapons upon his person, or keeping a rifle in the barn. His only knowledge in regard thereto is found in the single instance when he met the decedent the day of the alleged holdup. Habit cannot be proved by showing a single isolated act (11 Ency.

of Evidence, 797), and a habit which was unknown to the defendant would be immaterial. (6 Ency. of Evidence, 770.)

Mitigation of punishment and disproof of malice: The decisions cited by the defendant in support of this portion of his argument are readily distinguished from the case at bar. The declarations by the courts in these cases apparently have application only to jurisdictions where the statute requires the jury to fix the punishment. Furthermore, evidence of the defendant's education, occupation and the age of his mother, would not in our opinion have any bearing upon the degree of turpitude of his act within the rule announced in cases cited by appellant. In the case at bar the jury did not assess the punishment. And even where the jury does assess the punishment the court may reduce the extent or duration thereof. It therefore appears that under our statute these matters, which do not bear upon the guilt or innocence of the defendant but may have a bearing upon the degree of turpitude of his act, can be properly presented to the court at the time sentence is passed (secs. 9369, 9370, 9333, Rev. Codes), and therefore, there appears no necessity for presenting them to the jury. (*Gardner v. State*, 90 Ga. 310, 35 Am. St. Rep. 202, 17 S. E. 86; 6 Ency. of Evidence, 799.)

Refusal to modify Instruction No. 20: The jury was fully and correctly instructed in regard to previous threats by the deceased in instructions 34 and 35. These instructions were requested by the defendant, and the defendant cannot, therefore, claim that they do not correctly state the law. It is not necessary that the whole law of the case be stated in a single instruction, and if the jury is correctly charged in other instructions the defendant cannot complain. (*State v. Byrd*, 41 Mont. 585, 111 Pac. 407; *State v. Van*, *supra*.)

MR. JUSTICE SANNER delivered the opinion of the court.

The appellant, Walter Whitworth, was convicted of the crime of murder in the second degree and sentenced to imprisonment for life. From the judgment of conviction and from an order denying his motion for new trial he appeals. Reliance is placed

in twenty-five specifications of alleged error, involving some fifty-odd rulings by the trial court. We have considered them all; many were manifestly correct; others were of no apparent consequence; still others, for lack of proper record, are not reviewable here. Under the rule established in this state, that [1] this court will be controlled in the disposition of appeals by considerations of substance and not mere technicality, we shall advert only to those rulings, properly presented, by which some substantial right of the appellant appears to have been erroneously and prejudicially affected.

1. The appellant sought to justify the homicide upon a plea [2] of self-defense. Besides giving his version of the homicide and his reasons therefor, he also testified that on the day of the homicide he was and for many months had been a ranch foreman in the employ of the Gillette Company; that on the morning of April 26, 1911, five days before the homicide, while he, unarmed, was driving his employer's wagon near one of the gates in the neighborhood, the deceased, armed with a rifle, overtook him, "threw down" on him, saying, "You are the son-of-a-bitch I am looking for this morning," cocked the rifle, pointed it at him, menaced him with it, several times threatening to kill him, on account of some cattle and horses belonging to Levin Brothers that had been turned out of one of the Gillette Company fields; on Whitworth suggesting that there were laws in the country available to the deceased if wrong had been done, deceased replied that his gun was law on Flat creek and Whitworth would have to abide by that; that at the point of the rifle deceased compelled Whitworth to promise to return the horses and to notify deceased of their return, and also compelled Whitworth to promise that he would resign his place with the company and leave the country; that at the close of the interview, deceased said: "Now remember, this Winchester is with me all the time and it is for you especially, and if you don't bring them horses back I am going to kill you; if I don't have this Winchester, I will have this," reaching into his hip pocket and drawing out a revolver.

To rebut this narrative, the state called Andy Levin, who was a brother of deceased and with him made up the firm of Levin

Brothers. Andy Levin testified that he knew his brother intended that morning to see Whitworth about the horses that had been driven away, and, being anxious, followed deceased away from the house some time after; that he saw the entire encounter from a distance of about 300 yards; that the deceased did not at any time point his rifle toward Whitworth but kept it at all times in the hollow of his arm; that they talked for ten or fifteen minutes, finally clasped and held hands "for more than a minute," and separated without any visible demonstration of hostility having been made. Whereupon, after some cross-examination along other lines, appellant's counsel asked leave to and offered to cross-examine the witness Andy Levin for the purpose of eliciting that on April 28, two days after the encounter referred to, the witness met Frank Adams, another employee of the Gillette Company, with one Robard, and engaged Adams in conversation about the horses that had been driven out of the Gillette Company field, demanding that in future he be notified of any horses or cattle the Gillette employees might see in his fields, and he would come and get them; that on Adams replying, "Our men would drive them out," the witness became abusive and said, they, referring to deceased and himself, would "kill any son-of-a-bitch they found driving horses out of the company's field, and that Whitworth had promised Adolph to bring back those horses, and if he did not do so it would not be healthy for him." This offer was objected to by the state and refused by the court. We think that cross-examination along the lines suggested should have been allowed and that its refusal was substantial error. "The purpose of trials of issues of fact is to bring out the whole truth, and to that end the right of cross-examination must be liberally interpreted and freely exercised. \* \* \* Properly understood, the right extends, not only to all facts stated by the witness in his original examination, but to all other facts connected with them, whether directly or indirectly, which tend to enlighten a jury on a question in controversy." (*Cobban v. Hecklen*, 27 Mont. 245, 263, 70 Pac. 805.) Necessarily included in this broad statement is the credi-

bility of the witnesses; and in view of its character it was important for the jury to know just what weight should be given to the testimony of Andy Levin. If the conversation referred to in the offer occurred, it was relevant and material evidence touching the verity of his account of the meeting between deceased and Whitworth on April 26; touching the attitude of himself and the deceased as one of hostility toward the appellant prior to and at the time of the homicide, and touching his own animus as a witness at the trial. If the witness admitted the conversation, such inferences therefrom as are valid would have at once obtained; if he denied it, the way would have been opened for contradictory evidence by the persons who heard his statements. (*State v. Hanlon*, 38 Mont. 557, 100 Pac. 1035.)

2. The appellant Whitworth at the time of the homicide was thirty-four years old, five feet and six inches in stature, and [3] weighed about 157 pounds. The deceased was younger, six feet and three or four inches tall, weighed from 200 to 220 pounds, without superfluous flesh, broad-shouldered, well-proportioned, well-muscled,—“apparently a very strong, muscular, robust man.” He had been shot four times; in the thigh, in the left hand and wrist, in the left arm and in the left breast. The last-mentioned shot entered just above the nipple, pierced the lung and base of the heart and caused almost, if not quite, instantaneous death. On behalf of the state there was evidence which tended to show that on the morning of the homicide, the deceased was plowing with a sulky-plow and four horses; that Whitworth rode up and commenced to shoot while the deceased was still upon the plow, engaged in managing the horses attached thereto, and without any demonstration or manifestation of hostility having been made by the deceased; that the deceased quit the plow, was followed by Whitworth, who kept on shooting, and that Whitworth fired one shot after the deceased had fallen to the ground. The defendant testified, in effect, that while pursuing his way along the road upon his employer’s business, he saw deceased plowing and rode up to him for the purpose of explaining that he (Whitworth) could not keep the promises exacted of him by deceased on April 26 and to request the de-



ceased to take up the matter with Mr. Reeder; that when he got within speaking distance the following occurred: "I says, as usual, 'Good morning, Adolph.' He didn't say good morning. I said, 'Adolph, I would like to speak to you in regard to the trouble we had last Wednesday, and it is a matter that we cannot settle within ourselves.' I says, 'I want you to go to Mr. Reeder and settle it with Mr. Reeder. I am acting under his instructions,' and I says, 'Furthermore, I cannot do what I promised you I would do; I cannot bring them horses back.' He says, 'You haven't brought them horses back?' and I said, 'No.' 'Furthermore,' I says, 'I don't intend to.' He says, 'You and I will settle it'; he says, 'I will kill you.' When he was off the plow he threwed his hand behind him and started toward me. I got my gun as quick as I could and fired twice as quick as I could; my horse reared and swung to the left with my back to Levin; I looked around over my shoulder and he was still coming. I fired twice more and the last shot that was fired I thought that I had wounded the man; I couldn't tell from any action that he made before that whether I had touched him at all or not. I did not fire at him after he got past me. \* \* \* Q. Mr. Whitworth, as Levin started towards you, having put his hand toward his hip pocket, why did you shoot? A. I was sure the man was going to kill me there and then. \* \* \* I saw Mr. Levin fall to the plowed ground. After I fired the last shot he went twenty-five or thirty paces."

Alvin Johnston, a witness for the state, also testified: "I saw Whitworth riding up and he rode up to where Levin was plowing and Levin stopped, and they talked probably a minute, and Levin got off the plow and throwed his right hand behind him and Whitworth drew his gun and commenced firing."

Whatever may be one's personal impression of Whitworth's story, it is clear from the above that a controversy existed as to who was the aggressor, as to whether there was on the part of the deceased an overt act or demonstration sufficient to induce a reasonable fear in the defendant for his personal safety, and as to whether the defendant did in fact kill the deceased under

the influence of such fear alone. To throw such light as he might upon this controversy, the defendant sought in divers ways—generally unsuccessful—to show threats by the deceased directed toward the defendant, but made out of his presence. It is unnecessary to recite all of these. The following illustration will suffice: Stephen Dagan, a witness for the defendant, was asked whether on April 8, 1911, he overheard any conversation between Adolph and Andy Levin with reference to any threats or difficulty with Whitworth. Objection by the state was sustained and thereupon the following offer of proof was made and refused: "The defendant now offers to prove by the witness Stephen Dagan testifying on the stand, and another witness, that they overheard a conversation on the evening of April 8, 1911, between the deceased, Adolph Levin, and his brother, Andy Levin; that said conversation occurred in the evening of said day, and that Andy told Adolph about a piece of land, and said that he had some talk with Reeder that afternoon at the Coulee ranch; the land referred to being that of a Mr. Hansen's. Reeder had stated to Andy Levin that he thought he had the lease, and Andy Levin thought that he had the lease. Thereupon Mr. Reeder called Andy Levin back from Reeder's house, Andy Levin was leaving, and said, 'I have here the man who will tell you who has the lease on that land,' and thereupon Whitworth came forward and showed Andy Levin the lease which he, Whitworth, had obtained from Hansen. Thereafter Andy Levin discussed with Adolph Levin the matter of horses and cattle being driven away from the Levin Bros. ranch. Andy said: 'The first man of Gillette's that he ever caught herding cattle or horses off his land he would kill him.' And Adolph said: 'That it wouldn't make any difference who it was, we will fix him, and if I do catch one of them, I will see that he don't do it again.' Adolph further said, referring to one of the Gillette Company employees, or Gillette's foreman: 'If I ever catch that fellow again, I will make him dance.' "

As we infer from the record, the views of the learned trial judge were: that communicated threats are admissible only "as a moving influence in the apprehension of the defendant"; that

uncommunicated threats are inadmissible, or if admissible at all, then not until there has been sufficient evidence independent of them to create the inference of self-defense, for which purpose something more than the defendant's statement should be required; and that threats—communicated or not—have no value in determining whether the deceased was the aggressor in the fatal affray. The law has been settled otherwise in this state. Over eleven years ago this court, discussing an instruction in a similar case, said: "It told the jury, in effect, that the threats were not pertinent to the consideration of the question whether or not the defendant was actually assailed or as a reasonable man believed himself in danger of great bodily injury or in peril of life at the hands of the decedent; in other words, that the prior threats of the decedent were not to be considered unless and until the evidence disclosed that the homicide was committed in necessary self-defense. \* \* \* Such is not the law. Evidence of threats made by the decedent against the defendant, and communicated to him, was admissible in the latter's favor as tending to characterize the acts and conduct of the decedent and of the defendant at the time of the killing. \* \* \* Evidence of prior threats should be considered with, not apart from, the conduct and acts of the decedent, as well as of the defendant. \* \* \* Threats of the decedent against the defendant which had not been communicated to the latter, were admissible for the purpose of indicating or tending to show that the decedent brought on the conflict or was the aggressor or assailant, and that the defendant acted in necessary self-defense. \* \* \* While prior threats of the decedent against the defendant, whether communicated or not, are inadmissible in justification unless at the time of the killing the decedent indicated by his conduct an intention to carry them into execution, evidence that they were made is relevant and material wherever there is any evidence tending to show such conduct or to prove that the decedent was the assailant at the time of the homicide." (*State v. Shadwell*, 26 Mont. 52, 66 Pac. 508.)

In *State v. Felker*, 27 Mont. 451, 461, 71 Pac. 668, the above principles were restated with this comment: "The controversy

as to who was in the wrong can be correctly determined only by revealing to the jury, so far as may be, the exact relations, actions and intentions of the parties to the affray, so that the jury may give due weight to every fact which influenced the mind of the defendant."

It is suggested by the attorney general that the particular [4] offer above quoted was inadmissible because the threats referred to were not specifically directed toward the defendant and because they were conditional upon catching the person in the act of herding cattle off the land, a condition which does not appear to have happened. We think this evinces a misapprehension of the scope and probative value of such threats if made. The fact that they are vague, indefinite and conditional is no bar to their admission. (*State v. Sloan*, 22 Mont. 293, 300, 56 Pac. 364.) The evidence offered, if true, manifests a hostile and aggressive state of mind in each of the Levin brothers, not only toward the employees of the Gillette Company, of whom the defendant was one, but toward the defendant as an individual. If its existence was known to him, it would amount to a constant threat communicated to him; if not, its existence would reflect the attitude of mind entertained by the deceased and throw light on the question as to who was the aggressor at the time of the homicide. (*State v. Hanlon, supra.*)

3. Complaint is made of the giving of certain instructions and of the refusal of certain others proposed by the defendant. It is contended here that the instructions, so far as they make any reference to the matter of previous threats, reflect the views of the trial judge as disclosed in the taking of the testimony. Instruction 20, which deals especially with the evidentiary scope and value of prior difficulty and threats, does apparently fall short of announcing the rule as above stated. Whether this be more apparent than real, the trial court will doubtless be more explicit at another time. In any event, neither as to this nor the other instructions complained of were specific objections of the right kind made in the trial court, so that matter needs no further attention.

We see no error in the refusal of defendant's proposed instruction No. 25.

The judgment and order appealed from are reversed and the cause is remanded for a new trial.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE HOLLOWAY did not hear the argument and takes no part in the foregoing decision.

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WALLACE, APPELLANT, v. WEAVER ET AL., RESPONDENTS.

(No. 3,255.)

(Submitted May 19, 1913. Decided June 2, 1913.)

[133 Pac. 1099.]

*Water Rights—Violation of Decree—Nominal Damages—Actions—Depositing Debris—Evidence—Instructions—Law of Case—Theory of Case—Conclusiveness on Appeal.*

Water Rights—Violation of Decree—Nominal Damages.

1. Though the violation of a water right decree may give rise to a proceeding in contempt, it is not sufficient to constitute a cause of action, even for nominal damages, since one to whom such a right is decreed neither owns the water nor the channel of the stream out of which it is taken, but merely has the right to use the water when it is needed; and therefore the rule that in a case of trespass upon real property, strictly speaking, the plaintiff has a right of action for nominal damages at least, has not any application.

Pleading and Practice—Error and Appeal—Refusal to Strike.

2. Reversible error may not be predicated upon a refusal to strike a so-called affirmative defense which in reality was no more than a denial in affirmative form.

Water Rights—Depositing Debris—Evidence as to Conditions on Adjoining Lands—When Inadmissible.

3. In the absence of a showing that the conditions at the two places were similar, defendants' evidence that debris had not been deposited upon land situated above that of plaintiff, for damage to crops on which because of defendants' wrongful use of water plaintiff sought damages and injunctive relief, was improperly admitted.

Instructions—Law of Case.

4. The instructions to the jury constitute the law of the case, whether right or wrong; a verdict rendered contrary to them is against law and cannot stand.

**Appeal and Error—Theory of Case—Conclusiveness.**

5. A party who consents to the trial of a cause in the district court upon a certain theory as to his liability in the premises is barred from urging a theory in conflict therewith on appeal.

**Water Rights—Extent of Right of Prior Appropriator.**

6. A prior appropriator of all the water in a stream is entitled to the maximum flow when needed, and may not be limited to the average flow.

**Appeal and Error—Recovery of Nominal Damages.**

7. A judgment should not be reversed and a new trial granted for the sole purpose of enabling appellant to recover nominal damages, unless he is substantially prejudiced by a failure to award such damages, as where the judgment carries costs.

*Appeal from District Court, Granite County; J. Miller Smith, a Judge of the First Judicial District, presiding.*

ACTION by William Wallace against James P. Weaver, Peter Noid, and C. E. Goldberg. From a judgment in favor of defendants and an order denying him a new trial, plaintiff appeals. Reversed and remanded.

*Mr. Edward Scharnikow, and Messrs. Rodgers & Rodgers, for Appellant, submitted a brief, and one in reply to that of Respondents; Mr. Scharnikow and Mr. W. B. Rodgers argued the cause orally.*

*Mr. D. M. Durfee, and Mr. W. E. Moore, for Respondents, submitted a brief and argued the cause orally.*

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1865, William Wallace and his predecessors in interest located a ranch upon Dunkleberg creek, in Granite and Powell counties, appropriated all of the waters of that creek for irrigation and other useful purposes, and thereafter used all the waters of said creek for such purposes during the irrigation season in every year, until interfered with by defendants. Many years after Wallace's appropriation, defendants Noid and Weaver located upon Dunkleberg creek above the ranch of Wallace, and about 1900 Weaver appropriated 200 inches of the waters of Gold creek, conveyed them into the channel of Dunkle-

berg creek and, by means of ditches tapping that creek, applied them to use upon his ranch. By some arrangement Noid secured an interest in the right which Weaver claimed. In 1906 a controversy arose and Wallace brought an action against Noid and Weaver, which action was numbered 734 on the records of the clerk of the court of Granite county. In that action Wallace alleged that defendants Noid and Weaver conducted the Gold creek water through a ditch from Gold creek to the top of a divide between Carruthers creek and Dunkleberg creek and on the Dunkleberg creek side of the divide, and there turned the water loose and suffered it to run down the mountain side into Dunkleberg creek, whereby large quantities of earth, rock and other debris were carried down into Dunkleberg creek, polluting the waters of that creek, interfering with the flow of springs which constituted a part of the supply of Dunkleberg creek, and that large quantities of this debris were carried down to Wallace's ranch and through his ditches over his property. It was further alleged that defendants were taking out of Dunkleberg creek much larger quantities of water than they were turning into the creek from Gold creek. In that action the defendants Noid and Weaver answered jointly, denying all the allegations of plaintiff's complaint with respect to their wrongful acts, and the defendant Weaver set forth affirmatively the facts relating to his appropriation of the Gold creek water and asked that his right to use the channel of Dunkleberg creek for conveying that water to his ranch be confirmed. The issues being settled and the cause ready for trial, the parties reached an agreement and a stipulation was duly entered into for a consent decree in favor of Wallace and against Noid and Weaver, and that decree was rendered and entered on September 27, 1907. The decree follows the stipulation of the parties and specifically enjoins the defendants in that action from discharging the waters of Gold creek at the top of the divide and permitting them to flow down the mountain side into Dunkleberg creek, and from using, controlling or handling the waters of Gold creek in the manner that the same had theretofore been handled by them, as set forth in plaintiff's complaint in that action. They

were further enjoined from using or handling the water of Gold creek in any manner so as to cause the same to carry down into the channel of Dunkleberg creek any debris whatever or depositing the debris about Dunkleberg creek so that it would find its way into the creek channel or interfere with the springs at its headwaters or along its course. They were also enjoined from taking out of Dunkleberg creek more water than they conducted into it from Gold creek, with a reasonable allowance for loss by seepage and evaporation. The right of defendants to use the channel of Dunkleberg creek through which to flow their Gold creek water was recognized and confirmed, but they were particularly enjoined from using it in the manner in which they had theretofore done; and by a mandatory provision they were required to devise and construct artificial ways and means through which the water should be conducted from the top of the divide into Dunkleberg creek so as to prevent debris from being washed down into Dunkleberg creek. In May, 1910, this action was commenced by Wallace against Noid, Weaver and Goldberg. In his complaint the plaintiff charges that the defendants have violated the decree in cause 734; that they have continued to conduct the waters of Gold creek into Dunkleberg creek channel in the same manner as they did before the decree was entered; that they have failed to devise any means for conducting the water from the top of the divide into Dunkleberg creek, and that they have taken from Dunkleberg creek larger quantities of water than they conducted into it from Gold creek. It is alleged that by reason of these violations of the decree and the wrongful conduct of these defendants, plaintiff has suffered damages through the loss of crops, injury to certain of his crops, and a permanent loss of a portion of the waters of Dunkleberg creek by reason of the destruction of some of the springs at the headwaters of that stream. It is alleged that defendant Weaver violated the provisions of the decree directly, and that he further violated them acting through Goldberg. To this complaint, defendants Noid and Goldberg interposed a joint answer, which is in effect a general denial of the allegations of the complaint; a plea of the bar of the statute of limitations,



and an affirmative defense, so called, in which it is alleged that the acts complained of by the plaintiff are the identical acts of which complaint was made in cause 734, and that the decree in that case is an adjudication upon these particular acts. The separate answer of Weaver is to all intents and purposes the same as that of Noid and Goldberg. There is a specific denial in his answer that Weaver used any of the waters of Dunkleberg creek during the season of 1909. Plaintiff demurred to these answers, but the demurrers were overruled and replies were filed. The cause was brought on for trial; the evidence was introduced, and at its conclusion the plaintiff requested the court to charge the jury that the evidence showed without any contradiction that the defendants had discharged the waters of Gold creek into Dunkleberg creek during 1908 and 1909 in the same manner as said waters had been discharged at the time and prior to the entry of the decree in cause 734, and "therefore you are instructed that your verdict in this case must be in favor of plaintiff and against the defendants." He also requested another instruction relative to the measure of damages based upon the instruction just referred to. These two requests were denied. The trial resulted in a verdict and judgment in favor of defendants, and from that judgment and from an order denying him a new trial, the plaintiff has appealed.

1. It is argued that the court erred in refusing to give plaintiff's requested instructions 2 and 3. It is urged that the evidence shows without any substantial contradiction that the defendants had not made any material change in the method of conducting the Gold creek water into Dunkleberg creek after the decree in No. 734 was entered; but we are unable to agree with this broad statement. There is evidence that they constructed certain ditches at the foot of the divide which caught up the waters as they came down the mountain side, and conducted them into Dunkleberg creek on grade. The evidence is not very clear as to the efficacy of this means of preventing the injury described in plaintiff's complaint in cause 734; but the court was justified in its refusal to give these instructions for another [1] reason. Counsel insist that for the violation of the decree

in cause 734, plaintiff is entitled to a judgment for nominal damages at least, and certain authorities are cited, but they do not bear out counsel's contention. Each is a case of trespass upon real property—strictly speaking—and it is elementary that in such a case the plaintiff whose property is trespassed upon has a right of action for nominal damages at least. But counsel overlook the peculiar character of plaintiff's property in Dunkleberg creek. However secure he may be in his right to the use of the waters of that creek, he does not own the waters and he does not own the channel of the creek. He has merely the right to their use when their use is needed; when the use is not needed, his rights are not superior to those of anyone else. So that the bare violation of the decree in 734 does not of itself give the plaintiff a right of action. The statute provides a means for punishing the defendants for their contempt. In *Dillon v. Great Northern Ry. Co.*, 38 Mont. 485, 100 Pac. 960, we analyzed a cause of action for legal wrong and said: "To constitute a cause of action for tort, then, the plaintiff's right must have been infringed by the wrongful act of the defendant, with the result that plaintiff suffered damages." While the mere violation of the decree might constitute a sufficient showing in a contempt proceeding, it is not sufficient to constitute a cause of action in favor of plaintiff, even for nominal damages.

2. The so-called affirmative defense in each answer is nothing [2] more than a denial in affirmative form. To strike it would simplify the pleadings, but reversible error cannot be predicated upon the trial court's refusal to do so.

3. Because of errors committed upon the trial of the cause a reversal of this judgment must follow. We shall therefore not discuss the question of the sufficiency of the evidence. The plaintiff complained that debris was carried down through the [3] channel of Dunkleberg creek and through his irrigating ditches over his meadow land, by reason whereof his hay crop was greatly injured, and that this resulted from the acts of defendants in handling the waters of Gold creek in the manner in which it is alleged they were handled. Upon the trial he offered evidence tending to show that silt was deposited over

his meadow land and that his hay, when it was cut, was dusty, dirty and greatly depreciated in value. The defendants, over objection of plaintiff, offered evidence that this condition did not prevail upon Goldberg's ranch, which is situated above the Wallace ranch. Witnesses testified that there was no deposit left on Goldberg's ranch after irrigation; that there was no dust or dirt upon his hay and that his hay crop was of first-class quality. The error in the admission of this evidence is apparent. There was not any attempt made to show that the conditions at the Goldberg and Wallace ranches were similar. It is conceded by counsel for appellant that if conditions were shown to be similar, this evidence would have been competent as tending to disprove the plaintiff's contention. But in the absence of any showing that the conditions were similar, the evidence is not only of no probative force, but likely to mislead the jury into the belief that Wallace's contention cannot be true because the same result was not found on the Goldberg ranch. To make the evidence competent it was incumbent upon the defendants to show that the conditions were similar.

4. Upon the trial the court gave an instruction numbered 2, as follows: "You are instructed that if you believe from the preponderance of the testimony that the defendants have within the periods of time alleged in plaintiff's complaint violated the terms and provisions of such decree in said suit No. 734 in any, either, or all of the respects set out in plaintiff's complaint, that for such violations you should award to the plaintiff damages against the defendants, such damages not to exceed the sum of five thousand dollars, the amount demanded in plaintiff's complaint." That the jury disregarded this instruction and returned a verdict directly contrary to its provisions, there cannot be any doubt. The evidence offered by the defendants discloses that they did not provide any artificial ways or means for conducting the Gold creek waters from the top of the divide down the mountain side into Dunkleberg creek, as they were enjoined to do in the decree in cause 734. This failure upon their part is charged in plaintiff's complaint, and instruction 2 above specifically directs the jury that if they found from the

evidence that the defendants failed in that regard, their verdict should be for the plaintiff. That they did fail is disclosed by their own evidence and that of every other witness who testified with regard to the situation at that point. There was no controversy over it whatever, and the verdict of the jury could not have been for the defendants. Counsel for respondents find fault with instruction No. 2 given, and we are now asked to say that the rule heretofore adopted in this state should be changed and, unless an instruction correctly states the law, the jury should not be bound by it. In *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, this court, speaking through Chief Justice Pemberton, said: "It needs no authority, then, to say that the jury is bound to take the law from the court. \* \* \*

And, when the law is announced by the court, it is the law of the case, until overruled by a higher authority. It follows, then, that a verdict in direct conflict with the law of the court is a verdict against the law. \* \* \*

So far as the jury is concerned, there is no such thing as the charge of the judge being contrary to law, because, whatever may be his charge, it is the law to them. \* \* \*

It matters not if the instruction disobeyed be itself erroneous in point of law. It is nevertheless binding upon the jury, who can no more be permitted to look beyond the instruction of the court to ascertain the law than they would be allowed to go outside of the evidence to find the facts of the case. \* \* \*

If the contention of appellant is correct, the time of this court in hearing future appeals will be devoted to determining whether the court or the jury were right in their views of the law in the trial of the cause in the lower court. Authority or no authority, we cannot give our sanction to a practice that would lead to such results. Such a course would ultimately result in overturning our system of keeping separate and distinct the powers and duties of courts and juries, confining each to its own proper province, in the degradation of the courts, and confusion and chaos in the administration of the law. Such calamities are much more to be deplored than the inconvenience and costs of a new trial in cases where juries usurp the powers of the court." The decision in that case

has been followed ever since. (*State v. Dickinson*, 21 Mont. 595, 55 Pac. 539; *King v. Lincoln*, 26 Mont. 157, 66 Pac. 836; *McAllister v. Rocky Fork Coal Co.*, 31 Mont. 359, 78 Pac. 595; *State v. Radmilovich*, 40 Mont. 93, 105 Pac. 91; *Bliss v. Wolcott*, 40 Mont. 491, 135 Am. St. Rep. 636, 107 Pac. 423; *Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673; *Lynes v. Northern Pac. Ry. Co.*, 43 Mont. 317, Ann. Cas. 1912C, 183, 117 Pac. 81; *Mason v. Northern Pac. Ry. Co.*, 45 Mont. 474, 124 Pac. 271; *Gleason v. Missouri River P. Co.*, 46 Mont. 395, 128 Pac. 586.) Any other rule than that announced above would confer upon the jurors in every instance the authority to determine the law of the case as well as the facts; and we are not prepared to go to that extreme limit, even for the sake of preventing the reversal of a judgment.

5. In any event, counsel for respondent contend that there was no liability on the part of the defendant Weaver. We do not agree with this, as a matter of fact. But even if their contention be correct, they would be precluded from making the assertion in this case, because of the fact that without any objection on their part they suffered the trial court to give instruction No. 3, as follows: "You are instructed that if you believe from a preponderance of the evidence, that there were violations of the provisions of the decree set out in plaintiff's complaint, between the periods of time mentioned therein by the defendant Goldberg after he went into possession and control of what is known as the Goldberg lands, and into possession and control of what is known as the Gold Creek Ditch and waters flowing therein, that the defendant Goldberg and the defendant Weaver are jointly liable and responsible to answer for any damages to the plaintiff therefor." By their failure to object to this instruction in the court below the defendants—including defendant Weaver—consented to the rule of liability which it announces and will not be heard in this court to urge a theory in conflict with it. (*Cohen v. Clark*, 44 Mont. 151, 119 Pac. 775.)

6. The contention of defendants that they took from Dunkleberg creek no more water than they conducted into it from Gold

creek, with ample allowance for loss by seepage, evaporation, etc., is founded, in part at least, upon a method of dividing the water for which defendants cannot possibly find any justification in law. Plaintiff, as the prior appropriator of all the [6] waters of Dunkleberg creek, was entitled to the maximum flow of that stream when needed and could not be limited to the average flow—a result brought about by defendant's method of dividing the waters.

7. Contending that if plaintiff was entitled to recover at all, he was entitled only to nominal damages, counsel for respondents in their brief say: "The rule is well settled that after verdict of a jury, and the refusal of the trial court to grant a new trial, the judgment will not be reversed for a failure to find nominal damages." To this there are two objections: (1) While the statement is correct in part, it is not a correct statement of the rule. The rule is: "A judgment for defendant will not be reversed and a new trial granted *merely* to enable appellant to recover nominal damages." (3 Cyc. 446; *McCauley v. McKeig*, 8 Mont. 389, 21 Pac. 22, 16 Morr. Min. Rep. 1; *McAllister v. Clement*, 75 Cal. 182, 16 Pac. 775; *Johnson v. Cook*, 24 Wash. 474, 64 Pac. 729.) (2) The rule, when correctly stated, is not of universal application. "But a failure to award nominal damages is reversible error where plaintiff is substantially prejudiced thereby—as where the judgment carries costs." (3 Cyc. 447, and cases cited.) This record does not show that plaintiff is entitled to nominal damages *only*. According to his theory and the testimony offered by him, he is entitled to substantial damages. The record does disclose that if the judgment in favor of defendants is allowed to stand, plaintiff will be compelled to pay them \$105 awarded them as costs.

Because of errors in the admission of evidence, and because of the fact that the verdict is contrary to the law, the judgment and order are reversed and the cause is remanded for a new trial.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

**CASES DETERMINED**  
**IN THE**  
**SUPREME COURT**  
**AT THE**  
**JUNE TERM, 1913.**

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**THE HON. THEODORE BRANTLY, Chief Justice.**

**THE HON. WILLIAM L. HOLLOWAY,**  
**THE HON. SYDNEY SANNER,** } **Associate Justices.**

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**STATE EX REL. BENNETTS, RESPONDENT, v. DUNCAN,**  
**MAYOR, APPELLANT.**

(No. 3,256.)

(Submitted May 19, 1913. Decided June 3, 1913.)

[133 Pac. 109.]

*Cities and Towns—Police Officers—Metropolitan Police Law—  
Wrongful Dismissal—Reinstatement — Mandamus—Laches—  
Appointment to Permanent Service—Duty of Mayor—Official  
Oath.*

**Police Officers—Wrongful Discharge—Mandamus—Laches.**

1. Under the rule that mere lapse of time before applying for relief by way of mandate is not sufficient reason for denial thereof, unless the delay has resulted in prejudice to the rights of the adverse party (or the relief sought depends upon doubtful and disputed questions of fact), relator, a policeman discharged contrary to the provisions of the Metropolitan Police Law (Rev. Codes, secs. 3304-3312), held not to have been barred because of laches in waiting thirteen months before taking action for his reinstatement, such delay being due to a desire to await final settlement of law questions in a similar proceeding then pending.

**Cities and Towns—Officers—Failure to Take Oath—Vacancies.**

2. The failure of the person elected or appointed to a city office to qualify within ten days (by taking the official oath) creates a vacancy

under section 3234, Revised Codes, which may be filled by the appointing power.

Same—Metropolitan Police Law—Police Officers—Appointment to Permanent Service—Duty of Mayor.

3. *Held*, that under the Metropolitan Police Law it is obligatory upon the mayor of a city to appoint one to permanent service on the police force who, after service for the probationary term of six months, has demonstrated his fitness for the position; *held*, further, that probationers, being members of the force, may be removed only upon charges made and trial had as provided in sections 5 and 6 of the Act (Rev. Codes, secs. 3308, 3309).

Same—Police Officers—Appointment to Permanent Service—Official Oath.

4. The permanent appointment of a probationer after completion of the probationary term of six months is not to be construed as the beginning of a new term of service but as a confirmation of the original appointment; therefore, having subscribed the official oath when first appointed, it is unnecessary that a new oath be taken and subscribed upon receiving permanent appointment.

*Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.*

APPLICATION for writ of mandate commanding defendant, Lewis J. Duncan, as mayor of the city of Butte, to reinstate plaintiff in the office of policeman. From a judgment awarding to plaintiff the relief asked, defendant appeals. Affirmed.

*Messrs. H. Lowndes Maury, John A. Smith, and N. A. Rotering*, for Appellant, submitted a brief; *Mr. Rotering* argued the cause orally.

Under the state of the record herein, laches of the relator, precluding a recovery, appear. Merrill on Mandamus, page 96, states: "The courts require those who would avail themselves of the assistance of this writ to be prompt in demanding the enforcement of their rights." Ignorance of his rights does not, as a rule, excuse a relator's delay. (*People v. Maxwell*, 87 App. Div. 391, 84 N. Y. Supp. 947.) Unsound advice obtained from counsel is no excuse. (*People v. Keating*, 49 App. Div. 123, 63 N. Y. Supp. 71.) And it has been held that the four months' limitation applicable to writs of *certiorari* will be applied. (*People v. Greene*, 87 App. Div. 346, 84 N. Y. Supp. 565.) If the party applying for *mandamus* waits a very long time, his application will be denied. (*Territory ex rel. Tanner v. Potts*, 3 Mont. 364, 368; *State ex rel. Beach v. District Court*,



29 Mont. 265, 270, 74 Pac. 498, and cases cited.) From an examination of the authorities it will be observed that if the respondent, or others interested, are placed in a prejudicial position by reason of the delay, the application will be denied. If the relator prevails in this proceeding, he will not only obtain a judgment reinstating him, but will also obtain the right to sue the city of Butte for salary covering a period of several years, which will mean the expenditure of a large sum of money. The taxpayers of the city of Butte are therefore interested, and they have been placed in a prejudicial position by reason of the delay of the relator in pursuing his rights. This proceeding, therefore, is different from those cases in which no one interested is prejudiced.

*Mr. W. E. Carroll*, for Respondent, submitted a brief.

"The court may, in the exercise of its discretion, deny an application for *mandamus* made after an unreasonable delay, especially where the delay has resulted prejudicially to the rights of the respondent or others interested. The applicant may avoid the effect of this rule by showing good excuse for delay." (26 Cyc. 393.) The lower court having so used its discretion in this case, we submit its action in that behalf is not subject to review, both on principle and by decided authority. "All proper presumptions will be indulged in favor of the correctness of the ruling in the court below" (*Id.*, 508), and its findings will not be disturbed unless clearly and manifestly unsupported by the evidence. (*Dove v. Independent School Dist. of Keokuk*, 41 Iowa, 689; *West Virginia N. R. Co. v. United States*, 134 Fed. 198, 67 C. C. A. 220; *State v. Ward*, 69 Wash. 342, 124 Pac. 913.) On appeal or error in *mandamus* proceedings the appellate court cannot consider the weight of conflicting evidence, or review the discretion of the court below in granting or refusing the writ, where it appears to have been lawfully exercised, and no abuse is shown. (26 Cyc. 507.) Delay is excused by the fact that the law is unsettled by reason of conflicting judicial decisions, and that litigation which will result in settling the law is pending by others. (*People v. Lantry*, 48 App. Div. 131,

62 N. Y. Supp. 630; *People v. Scannell*, 27 Misc. Rep. 662, 59 N. Y. Supp. 679; *People v. Chicago*, 148 Ill. App. 96; *Hill v. Boston*, 193 Mass. 569, 79 N. E. 825.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This is an appeal by defendant from a judgment awarding to the relator a peremptory writ of mandate commanding defendant to reinstate him in the office of policeman of the city of Butte, from which he alleged he was unlawfully removed by Charles P. Nevin, the predecessor of defendant. The statement of facts out of which the controversy grew may be found by reference to the opinion in *State ex rel. Rowling v. District Court*, 41 Mont. 532, 110 Pac. 86. The relator herein was not a party to that proceeding nor to another which resulted in a final determination that the relators therein were entitled to be restored to active duty. (*State ex rel. Rowling v. City of Butte*, 43 Mont. 331, 117 Pac. 604.) When by the final judgment entered in the latter proceeding a peremptory writ of mandate was awarded, the defendant, who had in the meantime succeeded Mayor Nevin, reinstated the relators in their offices and restored them to active duty. The relator herein had theretofore made repeated demand upon Mayor Nevin for reinstatement, but the demand had as often been refused. When the defendant made the order of reinstatement in obedience to the writ, the relator herein demanded that he also be reinstated. The demand was refused. Thereupon this proceeding was commenced. Referring to the statement in *State ex rel. Rowling v. District Court*, 41 Mont. 532, 110 Pac. 86, *supra*, it will be noted that the relator received his permanent appointment from Mayor Corby, the predecessor of Mayor Nevin, after undergoing examination and performing probationary service as required by the Metropolitan Police Law (Rev. Codes, secs. 3304-3312), and that he was one of the members of the police force peremptorily discharged by Mayor Nevin on December 18, 1909, and restored by him to active duty and retired to the eligible list without pay on April 28, 1910. Counsel for defendant base their contention that the

district court erred in awarding the writ, on two grounds, viz.: (1) That it affirmatively appears that the relator was guilty of laches in failing to apply for relief until the lapse of more than one year after his removal; and (2) that it is not shown by the evidence that he took and subscribed the oath of office required by law within ten days after he received his permanent appointment from Mayor Corby.

In support of their first contention counsel rely upon the rule that those who would avail themselves of the assistance of the [1] writ of *mandamus* must be prompt in demanding the enforcement of their rights, or they will be held to be barred by laches. The rule invoked by counsel has heretofore been recognized and enforced by this court. (*Territory ex rel. Tanner v. Potts*, 3 Mont. 364; *State ex rel. Beach v. District Court*, 29 Mont. 265, 74 Pac. 498.) The word "action," as used in the provisions of the Revised Codes relating to the time of commencing actions, is to be construed, when necessary, as including special proceedings of a civil nature (Rev. Codes, sec. 6476). An application for *mandamus* is classed as a special proceeding of a civil nature (Part III, Title I, Chap. II). The only limitation applicable to such proceedings is found in section 6451, which is a general provision applicable to all actions for which special provision is not otherwise made. It was pointed out in *State ex rel. Bailey v. Edwards*, 40 Mont. 313, 106 Pac. 703, that notwithstanding this provision, the courts may, in their discretion, deny relief when there has been a long delay in applying for it, in the absence of excuse or explanation. It was held that the propriety of granting relief in any case will be determined, not merely by the lapse of time permitted by the relator before making his application, but that the writ will go unless the delay has resulted in prejudice to the rights of the adverse party or the relief sought depends upon doubtful and disputed questions of fact. Accordingly, though the application in that case had been delayed for about ten months, in the expectation that the final judgment in the case of *State ex rel. Quintin v. Edwards*, 40 Mont. 287, 20 Ann. Cas. 239, 106 Pac. 695, would settle and determine the question of law upon which the relator's

rights depended, the writ was allowed to go. In this case the following facts are shown as excusatory of relator's delay: Mayor Nevin discharged him, with thirteen others, from the force at the same time. The others at once instituted proceedings to secure their reinstatement. The relator, acting upon the assumption that these proceedings would determine the controverted questions of law involved, notified Mr. Nevin that he would not acquiesce in his removal, and that he would hold himself in readiness to be restored to active service in case it was determined that Mr. Nevin's action was illegal. When it was finally determined that Mayor Nevin was without authority to reduce the force by summary removals therefrom (*State ex rel. Rowling v. Mayor of the City of Butte*, 43 Mont. 331, 117 Pac. 604), the relator demanded of the defendant, who had in the meantime succeeded to the office of mayor, that he be reinstated. The defendant refused the demand. The order reinstating the other members of the force was made May 31, 1911. This proceeding was brought on June 15. These facts are not disputed. Under the circumstances we do not think the district court abused its discretion in holding that the relator was not open to the imputation of laches, though he delayed his application for relief from April 28, 1910, the date of his final removal, to June 15, 1911, a period of more than thirteen months. The institution of proceedings at any earlier date would not have hastened the settlement of the controversy as to the correctness of the action of Mayor Nevin in the first instance, or his power to reduce the force without authority from the city council. The contention of counsel is therefore overruled.

In the Revised Codes we find these provisions:

"Sec. 3234. Each officer of a city or town must take the oath of office, and such as may be required to give bonds, file the same, duly approved, within ten days after receiving notice of his election or appointment; or, if no notice be received, then on or before the date fixed for the assumption by him of the duties of the office to which he may have been elected or appointed; but if anyone, either elected or appointed to office, fails for

ten days to qualify as required by law, or enter upon his duties at the time fixed by law, then such office becomes vacant. \* \* \*

"Sec. 3248. Before entering upon office all officers elected or appointed must take and subscribe the constitutional oath of office."

It is alleged in the affidavit for the writ that the relator duly qualified as required by these provisions, both upon his appointment for the probationary term and upon his permanent appointment. These allegations are denied by the defendant. The evidence shows that the relator qualified regularly as a member of the police force upon entering upon the probationary term, but does not show that he again qualified when he received his permanent appointment. When questioned on this point he stated that he did not remember whether or not he had qualified, and the fact that he did so was not made to appear from the files in the clerk's office. The contention of counsel for defendant proceeds upon the assumption that the burden was upon the relator to show his title to the office, and that since he thus failed to show that he had qualified in conformity with the provisions of the statute, the presumption must obtain that the office became vacant at the expiration of ten days after his permanent appointment. Giving to section 3234, *supra*, the [2] force and effect which the legislature evidently intended it should have, we think that it should be construed to mean that the failure of the person elected or appointed to office to qualify within the time prescribed creates a vacancy in the office which may be filled by the appointing power. The courts are somewhat at variance in the construction of such statutes (Throop on Public Officers, sec. 173; 29 Cyc. 1388); but it seems to us inconceivable that when an office "becomes vacant," it may still be regarded as being occupied by a legal incumbent. The office of relator, therefore, must be deemed to have become vacant by his failure to take and subscribe the official oath as required by the statute, unless the taking of the official oath at the time of his appointment for the probationary term was sufficient.

Section 3 of the Metropolitan Police Law (Rev. Codes, sec. 3306) provides that all members of the police force shall first be appointed for a probationary term of six months, and there-

upon the mayor may appoint them to hold during good behavior or until by age or disease they become permanently incapacitated. Section 4 (sec. 3307) provides for the establishment of an examining and trial board. Section 5 (sec. 3308) requires all applicants to take an examination as to their legal, mental, moral and physical qualifications and ability to fill the position of member of the force. It then provides that no member shall be removed except upon charges preferred and after a trial by the examining and trial board. There is not anywhere in the statute any distinction made as to the official character of those serving as probationers and those serving under permanent appointment. Nor is there any special method provided for the removal of those members who are serving as probationers. Both alike seem to be regarded as members of the force. At the time the legislation was enacted, men who served as policemen were frequently appointed to service by the mayor and council without reference to their qualifications, except as to their party affiliations, very frequently those who were most ready to act as political agents of the city administration being given preference. They were expected to attend caucuses, primaries and conventions and to work at the polls at election time—not so much to preserve order as to influence voters in favor of the administration candidates and measures. For this reason with every change of administration there was a change of the personnel of the force in order to reward the partisans of the prevailing party or faction for their faithful and efficient service as political agents, rather than as guardians of the peace and safety of the citizen. Under these conditions inefficient service and corrupt practices were the rule rather than the exception. The purpose of the legislature in enacting the legislation was to remedy this condition by removing the police force as far as possible from the control of partisan political influences by putting it under civil service rules, and thus raise the standard of efficiency. (*State ex rel. Quintin v. Edwards, supra.*) While the language of section 3 seems to imply discretionary power in the mayor to appoint probationers to permanent service or otherwise to consider their places vacant when

this term is completed, yet when we keep steadily in view the purpose sought to be accomplished by the legislation, this cannot be its meaning. If this section should be so construed, the result would be that the necessity for the creation of an effective, permanent force would depend entirely upon the personal views of him who happens at any time to occupy the office of mayor, and his partisan preferences could be exercised without restraint except that he would be compelled to appoint the probationers from the eligible list provided for in section 7. In view of the [3] purpose sought to be accomplished, we think it was the intention of the legislature to make it obligatory upon the mayor to appoint each probationer to permanent service at the expiration of six months, unless during this period he has demonstrated his lack of fitness for such service, and that, being a member of the force, he may not be removed except upon charges made and trial had before the examining and trial board as in other cases, under the provisions found in sections 5 and 6 (secs. 3308, 3309). This conclusion seems necessary in view of the fact that those appointed to probationary service are deemed to be members of the force and that no other method is provided by which they may be removed from it. The permanent appointment, there- [4] fore, is nothing more nor less than a confirmation of the original appointment, and does not mark the beginning of a new term of service by the appointee as though he had been appointed for another term or to another office. In other words, the appointee has fulfilled the conditions attached to his probationary appointment, viz.: the rendering of efficient service for the period of six months, and is, by operation of law speaking through the mayor, continued in the same office. It was therefore not necessary for the relator, upon receiving his permanent appointment, to qualify by again taking and subscribing the official oath.

We know of no authority directly in point; but it has, we believe, been the uniform practice in this state since its foundation for the lieutenant governor, when he has succeeded to the office of governor, temporarily or for an unexpired term, to enter upon the discharge of his duties without taking a new oath.

Indeed, such an act would be an idle ceremony, since in contemplation of the Constitution the qualification for the office for which he is elected is a qualification for the office of governor to which, upon certain conditions, he may by operation of law succeed. (*Opinion of Justices*, 70 Me. 593.) The practice, we think, should control here.

The judgment is affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

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BURCH, RESPONDENT, v. ROBERSON, APPELLANT.

(No. 3,258.)

(Submitted May 20, 1913. Decided June 4, 1913.)

[132 Pac. 1132.]

*Justices of the Peace—Default Judgment—Order Setting Aside—Not Appealable.*

1. An appeal does not lie from an order of a justice of the peace sustaining a motion to set aside a default judgment, open the default and permit an answer to be filed, or from any order, the only appeal permitted from such a court being from a judgment.

*Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.*

ACTION by J. T. Burch against R. L. Roberson. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Cause submitted on brief of counsel.

*Mr. J. L. Staats and Mr. F. H. Mehlberg, for Appellant.*

*Mr. Warren W. Goodman, for Respondent.*



MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In April, 1912, J. T. Burch commenced an action in the justice of the peace court of Gallatin county against R. L. Roberson, to recover upon a money demand. Such proceedings were had that the default of defendant was entered and a judgment rendered for plaintiff. Thereafter the court made and entered an order sustaining a motion of defendant to set aside the judgment, open the default and permit an answer to be interposed. From that order the plaintiff appealed to the district court. The defendant then moved that the pretended appeal be dismissed, upon the ground that the district court did not acquire jurisdiction of the cause, but this motion was denied and over the objections of defendant, the district court proceeded to try the questions presented by the appeal, determined that the justice of the peace had erred in opening the default, and rendered and caused to be entered a judgment in favor of the plaintiff according to the prayer of his complaint. From that judgment the defendant prosecuted this appeal, and presents the question: Is there any appeal to the district court from *an order* made by a [1] justice of the peace court? The precise question was determined in *State ex rel. Cobban v. District Court*, 30 Mont. 93, 75 Pac. 862, where it was held that there is not any appeal from an order of a justice of the peace court granting or refusing a motion to set aside a default, and that the only appeal permitted from a justice of the peace court is an appeal *from a judgment*. Counsel for respondent in his brief says: "Sec. 7122 of the Codes of Montana provides for an appeal 'when the justice's or police court has abused its discretion in setting aside or refusing to set aside a default or judgment.' " But the language quoted is only a part of the sentence. As it appears in the Codes, the sentence reads: "There is no appeal from a *judgment* by default rendered in a justice's or police court, except on questions of law which appear on the face of the papers or proceedings, and except in cases when the justice's or police court has abused its discretion in setting aside or refusing to set aside a default or judgment." When considered in connection

with the remaining portion of the section and with section 7121 as amended, the meaning of this sentence is perfectly plain. The appeal in any case lies only from the judgment, and the district court must try the cause anew as it was tried, or should have been tried, in the justice of the peace court. The scope of the district court's investigation in any given case is determined, in the first instance, by the character of the judgment from which the appeal is taken. If the judgment was entered by default, ordinarily the district court is limited to questions of law which appear on the face of the papers or proceedings; but if a motion to open the default was made in the justice of the peace court, the question whether that court abused its discretion in granting or refusing to grant the motion may be tried and determined by the district court. But whatever be the scope of the investigation, the appeal lies only from a judgment. What was said by this court in *Maxey v. Cooper*, 21 Mont. 456, 54 Pac. 562, *State ex rel. Shanahan v. Lindsay*, 22 Mont. 398, 56 Pac. 827, *State ex rel. Reynolds v. Laurendeau*, 27 Mont. 522, 71 Pac. 754, and *State ex rel. Beadle v. Smith*, 42 Mont. 492, 113 Pac. 294, is to be understood in the light of the fact that there was involved in every one of those cases *a judgment* by default and an appeal or right of appeal therefrom.

The district court of Gallatin county did not acquire jurisdiction over this cause and should have granted the motion to dismiss the pretended appeal. The further proceedings in that court were *coram non judice* and void.

The judgment of the district court is reversed and the cause is remanded, with directions to enter an order sustaining the motion to dismiss the pretended appeal from the justice of the peace court.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNEE concur.

O'ROURKE, EXECUTRIX, RESPONDENT, v. GRAND OPERA  
HOUSE CO., APPELLANT.

(No. 3,259.)

(Submitted May 21, 1913. Decided June 7, 1913.)

[133 Pac. 965.]

*Corporations—Directors—Advancements to Corporation—Repayment—Special Meetings—Notice—Insolvency—Rights of Creditors—Preferences—Who may not Question—Evidence—Stenographers—Harmless Error—Appeal from New Trial Order—Questions not Reviewable.*

Appeal and Error—Questions not Reviewable on Appeal from New Trial Order.

1. The sufficiency of the complaint not having been challenged by objection to the introduction of evidence, or otherwise, and a ruling of the court obtained thereon during trial, the question is not reviewable on appeal from an order denying a new trial, but may be examined only on appeal from the judgment.

Corporations—Board of Directors—Special Meetings—Verbal Notice—Sufficiency.

2. Verbal notice of a special meeting of the board of trustees of a corporation organized under the Compiled Statutes of 1887 was sufficient to make its proceedings proof against the objection that they were void because not based upon a written notice.

Same—Special Meetings—Written Notice—When Unnecessary.

3. Notice in writing to the members of the board of directors of a corporation of the holding of a special meeting, as required by section 449, Civil Code of 1895 (Rev. Codes, sec. 3848), was not indispensable to the legality of the proceedings, where all the directors attended and participated without objection in the dispatch of the business in hand.

Same—Directors—Sale of Stock—Effect.

4. Upon the assumption that the sale of his stock in a corporation *ipso facto* vacated the office of the seller as a director, such result did not follow where at the time of a special meeting of the board negotiations for the sale, though pending, were not completed.

Same—Directors—Advancements to Corporation—Repayment.

5. A director may advance money to his corporation for the payment of legal expenses, charges for taxes, insurance, etc., and enforce his claim for repayment, provided he act in good faith and do not obtain an advantage to the detriment of the other stockholders.

Same—Directors—Advancements—Allowance of Claim—Preference.

6. That a director of a corporation by the action of the board of directors in allowing a claim of the former for repayment of advancements made by him, gained a preference over other of its creditors was not a matter of concern to the corporation, but one to be adjusted between the creditors themselves.

Same—Insolvency—Rights of Creditors.

7. The fact that a corporation is insolvent does not affect the right of one of its creditors, whether one of its officers or a stranger, to reduce his claim to judgment.

Evidence—Stenographers—Reading from Transcript of Notes—Harmless Error.

8. An official stenographer who had reported the testimony of a witness on a former trial of the cause who died in the interim between the two trials was properly permitted to read such testimony from a transcript made of his notes which had been lost, after swearing to the correctness of the original notes and the transcript; and though technical error was committed in giving him permission to do so without a showing that he had no independent recollection of the testimony (Rev. Codes, sec. 8020), such error was nonprejudicial, the case having been tried without a jury and the other evidence adduced having been amply sufficient to sustain the court's finding.

*Appeal from District Court, Silver Bow County; John B. McClernan, Judge.*

ACTION by Mary E. O'Rourke, as executrix of the estate of John O'Rourke, deceased, against the Grand Opera House Company. Judgment for plaintiff. Defendant appeals from an order denying its motion for a new trial. Affirmed.

*Messrs. Jas. E. Murray, Chas. O'Donnell, and Alex. Mackel, for Appellant, submitted a brief; Mr. O'Donnell and Mr. Murray argued the cause orally.*

Was the board of directors legally assembled? Mr. Thompson lays down the rule that any act of the majority of the directors of a board which has not been regularly assembled, as when notice of the meeting has not been given, will be without force or validity. (1 Thompson on Corporations, secs. 706-709; *Despatch Line v. Bellany Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Elliot v. Abbot*, 12 N. H. 549, 37 Am. Dec. 227; *Citizens' Securities Co. v. Hammel*, 14 Cal. App. 564, 112 Pac. 731.) Without being summoned together in a manner provided in the by-laws, or by the statute in the absence of by-laws, members of the board have no official authority or discretionary power, nor have they any original authority at all, and the accidental assembly of the majority of persons who are directors of a company without compliance with the by-laws or statute, does not constitute a regular board and their acts are not binding on the company.

(3 Thompson on Corporations, sec. 3932; *Hillyer v. Overman Silver Min. Co.*, 6 Nev. 51; *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607, 3 Morr. Min. Rep. 511.) We submit that the meeting of the directors in this case having been called by Mr. Bender, and not by "special notice in writing given to each director by the secretary, on the order of the president," as provided by section 3848, Revised Codes, the meeting was not duly assembled, and the resolution attempted to be adopted was invalid and of no force or effect whatever. The question when directors shall be considered duly assembled is not settled by the statute. Under the authorities it is uniformly held that a mere gathering of the directors and transaction of business by them while so assembled will not render their acts legal and binding. (*Harding v. Vandewater*, 40 Cal. 77.) Even though all the directors meet together, their acts while so assembled are not valid corporate acts. It must first appear that they were "duly assembled." (*Alta Silver Co. v. Alta Placer Min. Co.*, 78 Cal. 629, 21 Pac. 373; *Thompson v. Williams*, 76 Cal. 153, 9 Am. St. Rep. 187, 18 Pac. 153; 3 Thompson on Corporations, sec. 3932.) A single director cannot bind a corporation by his declarations or put a construction on its contracts, nor can any number of the directors do so except when duly assembled and acting as a board. (10 Cyc. 775; *Cascade Ins. Co. v. Journal Co.*, 1 Wash. 452, 25 Pac. 330; *Hartford Bridge Co. v. Granger*, 4 Conn. 142; *Butler v. Cornwall Iron Co.*, 22 Conn. 335; *Hamlin v. Union Brass Co.*, 68 N. H. 292, 44 Atl. 385; *Woodbury Granite Co. v. Mulliken*, 66 Vt. 465, 30 Atl. 28; see, also, *Smith v. Cornelius*, 41 W. Va. 59, 30 L. R. A. 747, 23 S. E. 599; *Wagner v. St. Peter's Hospital*, 32 Mont. 206, 79 Pac. 1054.)

O'Rourke was disqualified by the sale of his stock and could not participate in any meeting of the directors. Where a statute requires a director to be a stockholder it follows that an out-and-out transfer of his stock holdings disqualifies him from acting as director. (3 Thompson on Corporations, sec. 3887; 10 Cyc. 738; *Chemical Nat. Bank v. Colwell*, 132 N. Y. 250, 30 N. E. 644; *In re Newcomb*, 18 N. Y. Supp. 16; *Seal of Gold Mining Co. v. Slater*, 161 Cal. 621, 120 Pac. 15.) This does not inter-

fere with the rule that a person who continues to act as a director, after parting with his stock holdings, may be estopped from asserting that he was not legally qualified to so act. As to all third parties, a person acting as a director, though he is disqualified, will nevertheless be held to be a director *de facto*. (*Seal of Gold Mining Co. v. Slater*, *supra*; 3 Thompson on Corporations, sec. 3893.)

It appears from the evidence that the defendant company was insolvent and under such circumstances a director will not be permitted to secure any preference or advantage by reason of his position with the company. (10 Cyc. 803; *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263; *Beach v. Miller*, 130 Ill. 162, 17 Am. St. Rep. 291, 22 N. E. 464; *Olney v. Connaicut Co.*, 16 R. I. 597, 27 Am. St. Rep. 767, 5 L. R. A. 361, 18 Atl. 181; *Consolidated Tank Line Co. v. Kansas*, 45 Fed. 7.) The directors occupied a fiduciary relation to the corporation, its stockholders and its creditors, and they had no right to use such relation and their official position for their own benefit or the benefit or advantage of any member or person to the injury of the stockholders. (*Haywood v. Lincoln Lumber Co.*, 64 Wis. 639, 26 N. W. 184; 10 Cyc. 787; *Washburn v. Green*, 133 U. S. 30, 33 L. Ed. 516, 10 Sup. Ct. Rep. 280.)

*Mr. L. O. Evans*, and *Mr. John E. Corette*, for Respondent, submitted a brief; *Mr. Evans* argued the cause orally.

Officers of a corporation may in good faith loan their money to the corporation for the legal purposes of the corporation, and hold and enforce their claims for the repayment thereof, as valid claims against the corporation. It is immaterial whether the corporation be solvent or insolvent. (3 Thompson on Corporations, secs. 4068, 4069; *Schnittger v. Old Home etc. Co.*, 144 Cal. 603, 78 Pac. 9; *Santa Cruz Ry. Co. v. Spreckles*, 65 Cal. 193, 3 Pac. 661, 802; *Miller v. Halsted*, Fed. Cas. No. 9572; *Mullanphy Bank v. Schott*, 34 Ill. App. 500; *Saltmarsh v. Spaulding*, 147 Mass. 224, 17 N. E. 316; *Foster v. Belcher S. R. Co.*, 118 Mo. 238, 24 S. W. 63; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328, 3 Morr. Min. Rep. 688; *Gould v.*

*Little Rock M. R. & T. Ry. Co.*, 52 Fed. 680; *Stokes v. Stokes*, 91 Hun, 605, 36 N. Y. Supp. 350; *Illinois Steel Co. v. O'Donnell*, 156 Ill. 624, 47 Am. St. Rep. 245, 31 L. R. A. 265, 41 N. E. 185.)

The question of illegal preference cannot be raised in an action at law, or by the corporation itself, but can only be raised by a creditor in a proper action in equity. The reason for the rule is plain. It is immaterial to the corporation how its property is distributed among its creditors, and the only person who can raise the objection is one who has been injured by the preference, which would be a creditor, and the creditor, of course, would have to proceed in equity. (*Henry Dibblee Co. v. Watson*, 60 Ill. App. 432; *Beach v. Miller*, 130 Ill. 162, 17 Am. St. Rep. 291, 22 N. E. 464; *Roseboom v. Whittaker*, 132 Ill. 81, 23 N. E. 339; *Atwater v. American Ex. Bank*, 152 Ill. 605, 38 N. E. 1017; *Illinois Steel Co. v. O'Donnell*, 156 Ill. 624, 47 Am. St. Rep. 245, 31 L. R. A. 265, 41 N. E. 185.)

We know of no better or more approved method of proving former testimony than that of producing on the stand the official stenographer who reported the same, giving opportunity to examine him as to his competency and methods, and as to any other detail tending to test the correctness of his report, and having him read the former testimony from his original notes then taken. In the present case the loss of the original shorthand notes was shown, and instead a typewritten transcript made shortly after the former trial by the stenographer, and which he swore to be accurate and correct, was used, and we know of no court which has held such evidence inadmissible. (*Cutler v. Territory*, 8 Okl. 101, 56 Pac. 861; *State v. Smith*, 99 Iowa, 26, 61 Am. St. Rep. 219, 68 N. W. 428; *Miles v. Walker*, 66 Neb. 728, 92 N. W. 1014; *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810; 40 Cyc. 2466.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by John O'Rourke to recover of the defendant corporation on two counts, the first upon a promissory note executed by the defendant to O'Rourke, and the second

upon an account stated for money expended by him for the use and benefit of the defendant. Subsequently, upon a suggestion of the death of O'Rourke by counsel for defendant, Mary E. O'Rourke, executrix of his will, was substituted as plaintiff. In its original answer defendant admitted its liability for the amount of the promissory note. Judgment was thereupon entered for the plaintiff upon the first count, and the action proceeded upon issues presented by an amended answer to the second count. The complaint alleges that between the 7th day of February, 1895, and the 15th day of October, 1896, the plaintiff paid for the use of the defendant various sums of money aggregating \$585, and that at a meeting of the board of trustees (directors) of the defendant held on the latter date, the defendant approved the payments and settled and allowed them as a valid debt against it in favor of O'Rourke. The answer denies generally all the allegations of the complaint, except the corporate capacity of the defendant. It then alleges affirmatively that from January 4, 1895, until and including January 4, 1897, O'Rourke was the president of the defendant, and that on February 1, 1895, and ever since that time the defendant has been, and now is, insolvent and unable to pay its debts. The reply denies that it is insolvent. The court, sitting without a jury, found the issues for the plaintiff and ordered judgment entered accordingly. The cause is before this court upon an appeal from the order denying defendant's motion for a new trial, its appeal from the judgment having heretofore been dismissed.

1. Counsel for defendant have devoted a considerable portion of their brief to a discussion of the question whether the complaint states facts sufficient to constitute a cause of action. This question cannot be agitated on this appeal. The sufficiency [1] of the pleading was not challenged during the trial by objection to the introduction of evidence, or otherwise, on the ground of a lack of material allegation therein; therefore, there was no ruling during the trial with reference to its sufficiency which can be regarded as an "error of law occurring during the trial," within the meaning of section 6794, Revised Codes, desig-



nating the grounds upon which a motion for a new trial may be made. When such is the condition, the question of the sufficiency of the complaint can be examined only on appeal from the judgment. (*Charles Schatzlein Paint Co. v. Passmore*, 26 Mont. 500, 68 Pac. 1113; *Campbell v. Great Falls*, 27 Mont. 37, 69 Pac. 114.) We may remark, however, that while the pleading is not a model, it alleges a cause of action upon an account stated.

2. It is argued that the evidence is insufficient to show defendant's liability, for the reason (1) that it appears that when the resolution was adopted by the board of directors approving O'Rourke's account, the board was not regularly assembled; (2) that it appears that O'Rourke was in collusion with the other directors after he had sold and disposed of all his stock in the corporation, and that his participation in the meeting of the board, under these circumstances, rendered its action in adopting the resolution void. The board of directors consisted of O'Rourke, W. R. Kenyon and M. J. Connell. O'Rourke was president, Kenyon vice-president, and Connell secretary. Prior to October 15, 1896, the company was engaged in litigation in an endeavor to foreclose a mortgage held by it upon real property in Butte, and to defeat claims for liens against the same property by others, including James A. Murray. It was without ready money with which to pay the expenses of litigation and to meet the charges for taxes, insurance, etc. From time to time O'Rourke advanced money to pay these charges. On February 7, 1895, the amount of his advancements aggregated \$762. At a meeting of the board of directors on that date, which was attended only by O'Rourke and Kenyon, the president and secretary were by resolution authorized to execute to O'Rourke a promissory note of the corporation for this amount, to bear interest from date. At a meeting held on October 16 of the same year, all the directors being present, a resolution was adopted authorizing the vice-president and secretary to execute the note, to bear date February 7, 1895, the reason for this action, as appears from the resolution, being that since O'Rourke's presence was necessary to make a quorum of the board at the meeting held

on February 7, 1895, and no business could be transacted without his vote, the resolution adopted at that time was not a valid act of the corporation. The resolution adopted at the later meeting contained this recital: "There being other payments in the sum of \$585 made by John O'Rourke for the use and benefit of the Grand Opera House Co., upon motion of W. R. Kenyon the said payments were approved by the board of trustees." It appears from the evidence that the advancements by O'Rourke were made by authority of the board of directors and that they were necessary to protect the interests of the company and to preserve its property. That this was the case is not seriously controverted by counsel for defendant, who introduced no evidence tending to impugn the honesty of O'Rourke or any of his associates. It may be noted just here that the note authorized at the later meeting of the board was the basis of the first cause of action and that the defendant permitted judgment to go for the amount of it, without offering any defense.

Counsel seriously contend, however, that since the meeting was not called by written notice as prescribed by section 449 of the Civil Code of 1895 (Rev. Codes, sec. 3848), the board of directors was not duly assembled, and hence that none of its proceedings were binding upon the company. This contention is without merit. The corporation was organized under the provisions [2] of the statute in force prior to the adoption of the Codes of 1895. While the directors (or trustees, as these officers were then designated) had the power to enact by-laws for the government of the corporation and the management of its business affairs (Comp. Stats. 1887, Fifth Div., sec. 454), they were not required to do so. It was left to them, at their option, to establish their own custom and method of doing this. They had adopted the custom of holding special meetings upon informal notice. The meeting was called at the instance of the president, verbal notice being given by the attorney of the corporation to all of the directors. It was held at the usual place of meeting. This was the custom which had always been observed, except that formal notice by publication was given of annual meetings. If the provisions of the Code of 1895 were not ap-

plicable, as counsel for plaintiff contend, because the corporation had not elected to continue its existence under them, the notice was sufficient. If the provisions of section 449 of that Code were applicable, nevertheless the necessity of formal notice in conformity therewith was obviated, because all of the directors attended and no one objected to the holding of the meeting because of the want of notice or for any other reason. While ordinarily the requirements of the statute cannot be [3] dispensed with, formal notice is not necessary when all the directors attend and participate without objection in the dispatch of the business in hand. "The only object of the notice is that the directors have an opportunity of being present at the meeting and taking part in its proceedings." (*Minneapolis Times Co. v. Nimocks*, 53 Minn. 381, 55 N. W. 546; see, also, *Stobo v. Davis Provision Co.*, 54 Ill. App. 440; *State ex rel. Grimm v. Manhattan Rubber Mfg. Co.*, 149 Mo. 181, 50 S. W. 321; *Troy Mining Co. v. White*, 10 S. D. 475, 42 L. R. A. 549. 74 N. W. 236; 2 Thompson on Corporations, sec. 1142; 10 Cyc. 786.) Counsel for plaintiff cite many cases in support of their contention, but they fail to note that in the cases cited a part of the directors did not attend the meeting and take part in the proceedings, but were either absent or, being present, protested against the proposed action. *Smith v. Dorn*, 96 Cal. 73, 30 Pac. 1024, and *Thompson v. Williams*, 76 Cal. 153, 9 Am. St. Rep. 187, 18 Pac. 153, are illustrative examples.

The record does not sustain the contention of counsel that at the time of the meeting O'Rourke had sold his stock and thus disqualified himself to act as a director of the corporation. In fact, he did sell his stock to James A. Murray, but the evidence does not go further than to show that at the time the meeting was held, negotiations for the sale were pending but not yet completed; for the stock was at the time in the hands of Mr. A. J. Davis, who had authority to complete the transaction. It does not appear how long it was afterward before the sale was actually made and the stock transferred. If it be conceded, [4] therefore, that in order to act as director, O'Rourke must have been a stockholder (Rev. Codes, sec. 3833; Civil Code 1895,

sec. 434), and that the sale of his stock *ipso facto* vacated his office as director, this result was not accomplished until the sale was completed. Under the allegations of the answer, however, the defendant is not in position to insist that O'Rourke's connection with the company was not legitimate. Upon the record, therefore, O'Rourke was a director at the time the meeting was held, and was qualified to act in any matter in which his interest was not adverse to that of the corporation. We are not required to determine definitely what his relations with the company were. He was preferring a claim against it. He was *pro hac vice* disqualified to vote. He took no part in the proceedings looking to the approval of the account. It was approved by a vote of both of the other directors who constituted a quorum of the board, and their action was binding upon the corporation.

Counsel question the validity of the action of the board on the ground that, if it be conceded that O'Rourke was a director of the corporation, he could not deal for himself and the corporation at the same time, and since it appears from the evidence that all the members of the board were antagonistic to Mr. Murray, the prospective purchaser of the O'Rourke stock, the result of the resolution was in any event to give O'Rourke an unfair advantage by reason of his position as director. The [5] rule is well settled that the officers of a corporation may lend money to the corporation for legal purposes and hold and enforce their claims for repayment, provided, however, they act in good faith and do not obtain an advantage to the detriment of the other stockholders. It is frequently the case, as here, that a corporation is temporarily in distressed circumstances, and if the officers were not permitted under such conditions to assist it by advancing the funds necessary to relieve its distress, the result would be disaster to its business and loss to its stockholders. (*Coombs v. Barker*, 31 Mont. 526, 79 Pac. 1; *Tatem v. Eglanol Min. Co.*, 42 Mont. 475, 113 Pac. 295.) An officer lending money to the corporation may even demand and receive security for his advancements. So long as he has acquired by the transaction no advantage which might not be

accorded to any other creditor under the same circumstances, his claim will be upheld and enforced. The record does not justify the assertion that there was enmity between Mr. Murray and the directors; but were this the fact, and were it also the fact that Mr. Murray had become the purchaser of the O'Rourke stock at the time the meeting was held, nevertheless the propriety of the action of the majority of the board of directors is not to be condemned for this reason alone. The evidence tends to show that the advancements had actually been made to the amount claimed. The admission by the board of the justness of the claim as a charge against the corporation could not wrong the stockholders.

It is argued that the directors put O'Rourke in a position [6] to gain a preference over the other creditors of the corporation and that his preference will be made good unless the judgment be set aside. This is a matter about which the corporation is not concerned. Whether O'Rourke's estate is entitled to a preference is a question to be determined upon an issue made between the executrix and the other creditors, if there are any, in a proceeding instituted to adjust their respective rights. The fact that the corporation is insolvent [7] does not affect in anywise the right of one of its creditors, whether an officer of the corporation or a stranger, to reduce his claim to judgment.

3. Error is predicated upon the action of the court in admitting certain evidence over the objection of the defendant. On [8] a former trial of this case, O'Rourke was alive and testified fully as to his relations to the corporation and the circumstances out of which his claim arose. His testimony given at that time was reported and a transcript of it made by the official stenographer at the request of the attorneys. Subsequently the person who was then stenographer went out of office. At the trial he was produced as a witness and sworn. After stating that his original notes embodied an accurate report of O'Rourke's testimony, that the transcript was a correct translation thereof, and that the original notes filed with the clerk had been lost or destroyed, he was permitted to rehearse the testimony by

reading from the transcript. It was objected that the evidence was incompetent, and it is argued that the court erred to the prejudice of the defendant in admitting it. It having been made to appear that O'Rourke was dead, his testimony given on the former trial was admissible (Rev. Codes, sec. 7887; *Reynolds v. Fitzpatrick*, 28 Mont. 170, 72 Pac. 510). Since the stenographer who reported it and made a transcript of it had testified that the transcript was an accurate translation of the original report, it was competent for him to rehearse the evidence, either by using the transcript as a memorandum to refresh his memory, or, in case he had no independent recollection of the testimony, to testify from the transcript. (Rev. Codes, sec. 8020; *Marron v. Great Northern Ry. Co.*, 46 Mont. 593, 129 Pac. 1055.) In permitting the witness to testify from the transcript without showing that he had no independent recollection of the testimony, the court was technically in error, under the rule declared in *Marron v. Great Northern Ry. Co.*, *supra*. Under the circumstances of this case, however, we do not think the error prejudicial. The case was tried without a jury. The other evidence submitted to establish the plaintiff's claim was amply sufficient to sustain the court's finding. Another trial could not accomplish any result other than to enable the court to require compliance with the statute (sec. 8020, *supra*) as to the technical method to be observed in order to render the evidence available to the plaintiff. We do not think a new trial should be ordered to accomplish this purpose.

The order is affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

## DOWNS, RESPONDENT, v. CASSIDY, APPELLANT.

(No. 3,262.)

(Submitted May 22, 1913. Decided June 13, 1913.)

[133 Pac. 106.]

*Slander—Complaint—Amendment—Trial—Postponement—Discretion—Evidence—Admissibility—Attorneys—Misconduct—Excessive Verdict—Review.***Slander—Complaint—Amendment—When Proper.**

1. Amendment of complaint in an action for slander, by changing the statement of the slanderous words from the third to the second person, permission to make which was asked at commencement of trial, was properly allowed, the change wrought by it not having introduced into the pleading a charge of a different slander at another time and place, the amendment having amounted to no more than the correction of a mistake therein as originally drawn.

**Same—Trial—Postponement—Discretion.**

2. In the absence of an affirmative showing that refusal to postpone the trial of a cause on the alleged ground of surprise on account of an amendment made to the complaint at its commencement worked prejudice to defendant, the exercise of the discretion lodged in the court in the premises is not subject to review.

**Same—Trial—Evidence—Objections—When Ineffective.**

3. After a question asked a witness has been answered, objection that the matter brought out is irrelevant and incompetent for any purpose comes too late.

**Same—Evidence—Admissibility.**

4. Slanderous words spoken of plaintiff by defendant either before or after the date of the charge laid in the complaint are admissible to show malice.

**Same—Wealth of Defendant—Evidence—Admissibility.**

5. Evidence of the wealth of defendant in an action for slander is admissible, it being an element of aid in determining his social rank and influence in society, thus tending to show the extent of the injury suffered by plaintiff; where punitive damages are allowed, such evidence is of assistance in the determination of the extent of the punishment to be inflicted upon defendant.

**Same—Attorneys—Misconduct—What Does not Constitute.**

6. Evidence of defendant's financial condition having been a proper matter of inquiry, the remark of counsel for plaintiff in his opening statement that defendant would be shown to be a person of wealth may not be said to have been such misconduct as to warrant the granting of a new trial, even though no evidence whatever touching the subject was later offered by him.

**Same—Excessive Damages—Review.**

7. The amount of damages awarded in an action for slander is a matter peculiarly within the discretion of the jury after taking into consideration all the circumstances appearing from the evidence, and its verdict (\$1,000 in this instance), claimed to be excessive, should not be disturbed unless the sum awarded is so large as to raise a presumption that it was the result of a gross error or of undue motives.

Same.

8. Unless, after making due allowance for the superior position occupied by a district judge in the trial of a cause, the supreme court is compelled to the conclusion that he abused his discretion in refusing a new trial asked for on the ground of excessive damages, his action will be affirmed.

*Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.*

ACTION by Sarah Jane Downs against Charlotte Cassidy for slander. Plaintiff had judgment. Defendant appeals from the judgment and from an order denying her a new trial. Affirmed.

*Messrs. Jesse B. Roote, W. A. Jackson, and John A. Shelton*, for Appellant, submitted a brief; *Mr. Shelton* argued the cause orally.

The allowance of the amendment at the trial changing materially the character of the alleged slanderous words set forth in the first cause of action and refusing the application of the defendant for a continuation of the trial was erroneous. The amendment consisted of a change in the set of words alleged to have been used from the second person to the third person. Under the complaint as it stood before the amendment, evidence of the set of words alleged in the amended complaint would not have been admissible. (18 Am. & Eng. Ency. of Law, 478, 479; 25 Cyc. 486.) It is held that if proof of such a different set of words is admitted, it constitutes a fatal variance, and is not proof of the cause of action alleged. It is upon the same theory that it is held that an amended complaint alleging the use of such a different set of words will not be allowed to be filed. The utterance of such a different set of words, it is held, constitutes an entirely different cause of action. (25 Cyc. 470, 471, and cases cited.) In one of the set of words which witness stated the defendant used was "a son-of-a-bitch." This was the use of a mere epithet. The slander alleged is the utterance of words imputing a want of chastity and the commission of the crime of larceny. One of the sets of words used imputes no crime or breach of chastity, and is not slanderous *per se*. "It is not actionable merely to call a woman a 'bitch' or a 'slut,'



such words not of themselves imputing a breach of chastity, although if they are used under such circumstances or in such connection as to show that they were intended and understood to mean an imputation of whoredom, they may be actionable." (25 Cyc. 322.)

Proof of the reputed or actual financial condition of the defendant is inadmissible for any purpose, and the assertion in the opening statement of counsel that proof of that character would be produced was improper. While proof is admissible to show the position occupied by the defendant in the community and her influence, for the purpose of showing the effect which her words would be likely to have, proof of her actual or reputed financial condition is inadmissible. Clearly, the possession of means or reputation for the possession of property would not of itself add any weight or give any greater effect to the statements of one person concerning another. According to all of the authorities, proof of the actual wealth of the defendant is inadmissible, and the rule that proof of the reputed wealth of such party is inadmissible is well sustained. (*King v. Sassaman* (Tex Civ. App.), 64 S. W. 937; *Robinson v. Eau Claire B. & S. Co.*, 110 Wis. 369, 85 N. W. 983; *Nailor v. Powder*, 1 Marv. (Del.) 408, 41 Atl. 88; *Morris v. Barker*, 4 Harr. (Del.) 520; *Palmer v. Haskins*, 28 Barb. (N. Y.) 90; *Young v. Kuhn*, 71 Tex. 645, 9 S. W. 860; *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489.)

For Respondent, there was a brief by *Messrs. McCaffery & Tyler*, and oral argument by *Mr. G. L. Tyler*.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for slander. Plaintiff had verdict and judgment, The defendant has appealed from the judgment and an order denying her motion for a new trial.

The complaint alleges four causes of action, each counting upon slanderous words spoken falsely and maliciously of and concerning the plaintiff, in the presence of persons named and

unnamed, at various times between August 20 and September 12, 1910. The first count, as originally drawn, charged that the words spoken of and concerning plaintiff were: "She is a bloody whore, and a thief; her son is a bastard and she and her family live like a pack of dogs." The words laid in the other three counts are of like import. The questions submitted for decision arise upon exceptions to the action of the trial court in permitting plaintiff to amend the first count of her complaint and in refusing the defendant a postponement of the trial, to its rulings in admitting and excluding evidence, and to its refusal to grant defendant a new trial on the grounds that counsel for plaintiff was guilty of misconduct during the trial prejudicial to defendant, and that the amount of damages awarded by the jury is excessive.

1. When the cause was called for trial the plaintiff was permitted, over objection by defendants, to amend the complaint by changing the statement of the slanderous words laid in the first count from the third to the second person. Thereupon counsel for defendant orally moved the court for a postponement of the trial. The ground alleged was surprise, but no showing was made other than a statement by counsel that they had made preparation to meet the charge as laid in the original complaint, and that they were not ready with their defense to the charge as laid in the amendment. The court overruled the application and ordered the trial to proceed. Defendant alleges prejudicial error. It is argued that since the amendment amounted to the introduction of an entirely new cause of action, [1] it ought not to have been permitted. The substance of the charge as laid was that the plaintiff was unchaste. The change wrought by the amendment was not to introduce into the complaint a charge of a different slander at another time and place, but merely to modify the language used by the defendant in making the same charge in order to avoid the consequences of a fatal variance at the trial. It was clearly within the discretion of the court under the statute (Rev. Codes, sec. 6589), to permit the amendment in that it amounted to no more than the correction of a mistake in the pleading as originally drawn.

(*Bates v. Harrington*, 51 Vt. 1; *Weston v. Worden*, 19 Wend. (N. Y.) 648; *Snediker v. Poorbaugh*, 29 Iowa, 488; *Baldwin v. Soule*, 72 Mass. 321; *Barber v. Barber*, 33 Conn. 335; *Conroe v. Conroe*, 47 Pa. 198; *Lister v. McNeal*, 12 Ind. 302; 13 Ency. Pl. & Pr. 96; 25 Cyc. 471; Newell on Slander and Libel, 759.) The case is within the rule which this court has constantly observed under similar circumstances. (*Dorais v. Doll*, 33 Mont. 314, 83 Pac. 884; *Sandeen v. Russell Lumber Co.*, 45 Mont. 273, 122 Pac. 913, and cases cited.) The fact that this is an action for slander does not make the rule any less applicable.

The court did not, under the circumstances disclosed, err in refusing a postponement of the trial. Counsel did not offer to show that the amendment presented an issue which they were not fully prepared to meet, or that they did not have at hand and were ready to introduce all the evidence available in support [2] of the defense. The power to grant or refuse a postponement on any ground is vested in the discretion of the court (Rev. Codes, sec. 6729). Its exercise in any case is not subject to review by this court, in the absence of an affirmative showing that the complaining party has suffered prejudice. (*Dorais v. Doll*, *supra*; *Jorgenson v. Butte etc. Co.*, 13 Mont. 288, 34 Pac. 37; *Montana Ore Pur. Co. v. Boston & Mont. etc. Co.*, 27 Mont. 288, 70 Pac. 1114, 22 Morr. Min. Rep. 471; *Christiansen v. Aldrich*, 30 Mont. 446, 76 Pac. 1007.)

2. During the examination of Mary Heaney, a witness for the plaintiff, she was asked to rehearse statements which she had heard defendant make concerning the plaintiff on other occasions than those alleged in the complaint. Her answer was: "She [defendant] called Mr. Downs a 'son-of-a-bitch,' and Mrs. Downs 'a damned whore.'" Being asked whether she heard defendant repeat these words concerning the plaintiff or any of them subsequent to that time, she answered: "Why, very often, very often." Counsel then interposed the objection that words uttered on any other occasion than those charged in the complaint were irrelevant and incompetent for any purpose. The objection was overruled. The witness Margaret Brooks,

having been asked similar questions, made similar answers. She was then asked: "Well, would it occur once a week, or—that is, as near as you can recollect—or about how often?" Counsel thereupon interposed the same objection as that interposed to the [3] testimony of Mary Heaney. Assuming that the evidence was incompetent and that the objection of counsel was tantamount to a motion to strike it from the record, the ruling was not erroneous. When a party sits by and allows evidence to go in without objection, he cannot complain that the refusal of the court to strike it out is prejudicial. (*Poindexter & Orr L. S. Co. v. Oregon S. L. R. Co.*, 33 Mont. 338, 83 Pac. 886.)

That in so far as the evidence in question cast upon the plaintiff an imputation of unchastity, it was competent, as [4] tending to show that the words laid in the complaint were spoken with malice, all the courts agree. The rule is well established both in this country and in England (25 Cyc. 496; *Newell on Slander and Libel*, 349, 350; *Odgers on Libel and Slander*, 275 *et seq.*); and many of the courts hold that any publication importing ill-will and hatred, made before or after the date of the charge laid, may be admitted to show malice, whether it might be made the basis for recovery in a separate action or not. (25 Cyc. 498, 499, and note.)

Complaints as to other rulings upon questions of evidence we do not find of sufficient merit to require special notice.

3. During the course of his opening statement to the jury, Mr. McCaffery, one of counsel for plaintiff, said: "We will show you, gentlemen of the jury, that the reputed wealth of this defendant is in the neighborhood of \$40,000; and if Mr. Roote [one of counsel for defendant] objects to this we will bring it [more] closer than that." Counsel for defendant took exception to this statement as misconduct. It is argued that since evidence either of the wealth or reputed wealth of defendant is not admissible for any purpose during the trial, the statement of counsel was such an irregularity as prevented the defendant from having a fair trial. The plaintiff did not offer any evidence as to the actual or reputed financial condition of the defendant. Indeed, so far as there is any evidence on the subject,

it tends to show that the defendant is in comparatively modest circumstances. While the decisions of the courts are not entirely [5] harmonious, by the great weight of authority evidence of the financial condition of the defendant is admissible, on the ground that his wealth is an element which aids in determining his social rank and influence in society, and therefore tends to show the extent of the injury suffered by his words; and where punitive damages are allowed, it aids the jury in determining the extent of the punishment to be inflicted upon the defendant. (Newell on Slander and Libel, 878, and cases cited in footnote; see, also, *Jones & Bro. v. Greeley*, 25 Fla. 629, 6 South. 448; *Kidder v. Bacon*, 74 Vt. 263, 52 Atl. 322; *Buckley v. Knapp*, 48 Mo. 152; *Burckhalter v. Coward*, 16 S. C. 435; *M'Almont v. McClelland*, 14 Serg. & R. (Pa.) 359; *Adcock v. Marsh*, 30 N. C. 360; *Brown v. Barnes*, 39 Mich. 211, 33 Am. Rep. 375, and notes.)

In *Stanwood v. Whitmore*, 63 Me. 209, it was said: "We think, however, that the wealth of a defendant should be proved by general evidence rather than by particular facts. It is the defendant's position in society which gives his slanderous statements character and weight. Reputation for wealth, rather than its possession, generally confers position. Therefore, the more proper inquiry is as to the reputation of a defendant for wealth. Of course, a presiding justice would have considerable discretion as to the form of a question in such a case, to be exercised according to circumstances." Under these authorities, counsel [6] was justified in his opening statement in proceeding upon the assumption that the evidence would be admitted, if offered, and it cannot be held to be misconduct on his part that he then expressed the intention to introduce it but later changed his mind, whatever reason he may have had for his subsequent action.

4. The jury fixed the amount of damages on each count at \$250, making the amount of the verdict \$1,000. It is argued that since it appears from the evidence that the slanderous words were heard by comparatively few persons, that all the witnesses who gave testimony against the defendant were unfriendly, that the parties are persons of humble position in the community

in which they reside, that defendant had some provocation because the plaintiff and her husband, who had been tenants of defendant, abandoned their tenancy leaving a balance of the rent and a small debt for borrowed money unpaid, and that it does not appear that defendant is in affluent circumstances, the amount of the verdict is manifestly excessive. It is true that the parties are of comparatively humble station, and that the slanders were circulated among a small number of people in the community; yet, as was remarked by the court of the defendant in *Casey v. Hulgan*, 118 Ind. 590, 21 N. E. 322, the defendant was not troubled with a stammering tongue nor was she slow of speech. She was evidently actuated by a spirit of malevolence toward plaintiff, as appears from the many repetitions of words of the same import as those laid in the complaint. While she may have had some cause to complain that plaintiff's husband did not promptly pay the balance of the indebtedness due her, the jury were justified in the conclusion that his delinquency in this regard was to be attributed to his inability rather than any disinclination to do so. His income consisted of his daily wages as a miner, and during the latter part of the tenancy his expenses had been materially increased by the illness and death of a son. In any event, his failure to discharge his debt was no justification for the vicious, groundless assault made by the defendant upon the character of the plaintiff, to this extent destroying the only possession of substantial value which she apparently had. She was entitled upon the evidence to recover substantial damages, and, in the discretion of the jury, punitive damages also. In such cases there is no accurate standard by which to measure the injury. The amount to be awarded [7] is peculiarly within the discretion of the jury after taking into consideration all the circumstances appearing from the evidence. The court ought not to interfere unless the sum awarded is so large as to raise a presumption that the amount fixed was due to some gross error on the part of the jury, arising out of a misconception of the case or the result of undue motives. (Newell on Slander and Libel, 848.) Furthermore, the discretion of the trial court in granting or refusing a new trial

on the ground urged here is moved by several considerations which this court cannot take into account. Among these is a personal view by the trial judge of the parties and their witnesses. His action must, therefore, be accepted as final unless after making due allowance for the superior position he occupies toward the case, this court is compelled to the conclusion that he has been guilty of an abuse of discretion. While upon the whole case disclosed by the evidence we doubt whether the jury should not have found a less sum, the existence of this doubt is itself sufficient to rebut any presumption, which might otherwise be indulged, that the trial court was guilty of a manifest abuse of discretion in refusing to grant a new trial.

The judgment and order are affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

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STEPHENS, APPELLANT, v. NACEY, RESPONDENT.

(No. 3,312.)

(Submitted May 26, 1913. Decided June 14, 1913.)

[133 Pac. 361.]

*Election Contests—Trial—Delay—Jurisdiction—Statement of Contest—Sufficiency.*

*Election Contests—Trial—Delay—Jurisdiction—Erroneous Dismissal.*

1. Where an election contest had been instituted within twenty days after the canvassers made their return (Rev. Codes, sec. 7238), the jurisdiction thus obtained of it was not ousted by neglect of the district judge to "thereupon order a special session or term of such court" on a day to be named by him (sec. 7241), or by error committed in failing to convene court "at the time and place designated" (sec. 7244), such latter sections being not mandatory but directory only.

*Same—Trial—Delay—Nonaction by Contestant—Effect.*

2. Mere nonaction on the part of contestant after filing his statement of contest could not be construed as an abandonment of it, so as to warrant dismissal for want of prosecution, where the district judge, though failing in the performance of his duty in the premises, did not refuse to call a special term of court, but, on the contrary, assured his counsel that he would do so.

**Same—Statement of Contest—Conclusions.**

3. An allegation in the statement of contest that contestee's name was not rightfully on the official ballot was not only a bare conclusion of the pleader, but did not, under section 7234, Revised Codes, constitute a ground of contest.

**Same—Statement of Contest—Insufficiency—Irregularities—Prejudice.**

4. Alleged malconduct on the part of election judges in omitting to certify to the number and names of the persons who voted, and the names of candidates and the number of votes received by each, constituted an irregularity which, in the absence of facts from which it might be inferred that contestee suffered prejudice, was insufficient to warrant rejection of the vote cast at the particular polling-place.

**Same—Statement of Contest—Fraud—Sufficiency.**

5. An allegation in a statement of contest that the election judges were guilty of malconduct in "that they pretended and represented and returned" to the board of canvassers that a certain number of votes had been cast for contestee at a particular polling-place, "whereas in truth and in fact" no votes had been cast for him at such place, if intended to charge fraud on the part of the election judges, *held*, to state a cause of action, though perhaps open to special demurrer.

**Same—Statement of Contest—Sufficiency.**

6. The allegation that contestee received a certain number of votes at a polling-place cast by persons who at the time were not residents of the state "but lived upon and within an Indian reservation, in said county, and were not in any respect qualified electors," *held* to state a ground of contest.

*Appeal from District Court, Valley County; J. Miller Smith, a Judge of the First Judicial District, presiding.*

ACTION by James R. Stephens against Patrick Nacey. From a judgment of dismissal of an election contest, contestant appeals. Reversed and remanded for further proceedings.

*Messrs. Norris, Hurd & Lewis*, for Appellant, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

In behalf of Respondent, *Messrs. Purcell & Horsky*, and *Mr. John L. Slattery*, submitted a brief; *Mr. R. R. Purcell* and *Mr. Antone Horsky* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

At the general election of 1912, Jas. R. Stephens was the Republican nominee for the office of sheriff in Valley county. The county canvassing board declared Patrick Nacey elected sheriff, and on December 2 Stephens filed his statement of contest. The clerk of the court immediately notified Hon. Frank



N. Utter, one of the judges of the twelfth judicial district, but nothing whatever was done by Judge Utter, and on December 24 Stephens disqualified him. On January 2 Judge Utter made an order transferring the cause to that department of the district court of Valley county presided over by Hon. J. W. Tattan. On January 3 Judge Tattan made an order calling a special term of court for January 18, and citation was issued and served. On January 17 the contestee appeared by demurrer and also filed an affidavit disqualifying Judge Tattan. Judge Tattan thereupon made an order calling in Judge Ewing, of Great Falls, and continuing the cause to January 27. On January 25 contestee filed his affidavit disqualifying Judge Ewing, and on the same day Judge Utter made an order calling in Judge Clements, of Helena. On January 26 Judge Clements, by telegram sent from Helena, directed the clerk to enter an order continuing the cause to February 6, and this direction was obeyed. On February 1 contestant disqualified Judge Clements, and on the same day Judge Utter made an order continuing the cause to February 11 and calling in Judge J. Miller Smith, of Helena. On February 11 Judge Smith opened court and called this proceeding. Contestee thereupon withdrew his demurrer and filed a motion to dismiss, upon the ground that a special term was not called by Judge Utter, and upon the further ground that Judge Tattan at chambers continued the cause from January 18 to January 27—a date more than twenty days from January 3, the day upon which the order calling the special term was made. In support of this motion certain evidence was received and certain evidence offered by contestant was rejected, contestee's motion was sustained and the proceedings dismissed. From the judgment of dismissal contestant appealed.

1. Section 7241, Revised Codes, provides that upon the state-[1] ment of contest being filed, the clerk shall inform the judge, who "shall thereupon order a special session or term of such court to be held at the courtroom, on some day to be named by it (him), not less than ten nor more than twenty days from

the date of such order, to hear and determine such contested election."

Section 7244 provides: "The court must meet at the time and place designated, to determine such contested election, and shall have all the powers necessary to the determination thereof. \* \* \*

In *Curry v. McCaffery*, ante, p. 191, 131 Pac. 673, we held that it was not intended to limit the special term of court to twenty days and that adjournments for more than twenty days did not oust the court of its jurisdiction. We further recognized the rule for which counsel for respondent now contend, that "the principal object sought to be attained by the enactment of statutes for contesting elections, is to secure a speedy trial and determination of all such contests." We may agree with counsel, also, that the word "thereupon," as used in section 7241 above, means "immediately" or "at once," and that the legislative command was intended to be obeyed. The failure or refusal of Judge Utter to act is unexplained. The duty imposed by section 7241 is so plain that failure or refusal to comply with the requirements imposed would seem to be inexcusable. But conceding that error was committed in the failure of Judge Utter to call a special term of court immediately upon receiving notice that the statement of contest was filed, and that error was committed again in the failure of the court to convene in special term "at the time and place designated" in the order which Judge Tattan made calling the special term, the question arises: Did such errors operate to oust the court of jurisdiction? To answer this inquiry in the affirmative would result in clothing a district judge with plenary power by his own wrongful conduct to deny to a litigant the right to be heard in a court constituted for the purpose of administering judicial remedies—a power which we refuse to recognize as being lodged in any judicial officer. Since the days of Magna Charta it has been the proud boast of the English people that their courts are open to everyone to afford a speedy remedy for every injury to person, property or character, and to administer right and justice without sale, denial

or delay. That charter of liberty, deemed essential to the very existence of free government, was a part of the inheritance of the original American colonies, has been adopted in the later states, and finds expression in section 6, Article III of the Constitution of Montana.

Section 7238 limits the right of the contestant in permitting him but twenty days after the canvassers make their return within which to institute his contest; but the district court has jurisdiction of the subject matter—election contests—and when a statement of contest has been filed within the limited time allowed, the court has jurisdiction of the subject matter of that particular contest. To deny to a contestant the right to be heard because the trial judge failed or refused to discharge his duty would set a premium upon official misconduct, impose a penalty upon a litigant for the judge's wrongful acts, and in its ultimate result would reach the very acme of injustice and oppression. Without stopping to consider whether it is within the power of the legislature, in view of the guaranty of our Constitution above, to enact a statute which could be construed to warrant such absurd result, it is sufficient to say that our legislature has not undertaken the task. The portion of the Codes dealing with election contests defines the duty of the contestant, the clerk, judge and court, but it does not impose any penalty upon the litigant for the derelictions of others.

In *Hagerty v. Conlan*, 15 Cal. App. 643, 115 Pac. 762, it was held that the provisions of section 1118, California Code of Civil Procedure, which are the same as those in our section 7241 above, are directory only. In *Busick v. Superior Court*, 16 Cal. App. 499, 118 Pac. 481, the same rule was applied to the provisions of section 1121, California Code of Civil Procedure, which are the same as those found in our section 7244 above; and in *Moore v. Superior Court*, 20 Cal. App. 299, 128 Pac. 946, the doctrine of the *Busick Case* was reaffirmed. With that conclusion we agree. In view of section 6315, Revised Codes, giving to each party to a proceeding the right to disqualify judges by filing disqualifying affidavits, to hold the provisions of sections 7241 and 7244 mandatory would be to defeat the very

purpose of the statute; for in practically every instance the contestee, by disqualifying the presiding judge on the eve of the day set for the hearing, could prevent a trial "at the time and place designated" in the order calling the special term and thereby oust the court of jurisdiction, if the terms of section 7244 are to be carried out strictly according to the language employed and not otherwise.

Our conclusion upon this branch of the case is that the district court of Valley county had jurisdiction of the subject matter and of the parties; that such jurisdiction was not ousted by any errors committed by the court or judges, and that in dismissing the proceeding the court erred.

Neither can the jurisdiction of the court be made to depend [2] upon the action or nonaction of the contestant after he has filed his statement of contest and while the proceeding is pending. His proceeding might be dismissed for want of prosecution; but if the evidence offered by contestant upon the hearing to dismiss be true—and for the purposes of this appeal it is taken to be true—he cannot be charged with having abandoned his contest or with responsibility for Judge Utter's failure to act. Contestant might have applied to this court for a writ of mandate; but to secure such writ it is the general rule that the applicant must allege that he has made demand for the performance of the duty and that such demand was refused. By his offered evidence contestant sought to prove that Judge Utter did not refuse to call a special term of court, but repeatedly assured counsel for contestant that he would call such special term. Of course, a time would come when counsel would not be justified in relying upon such assurances further, and would be called upon to take appropriate steps to compel the performance of the duty by the judge, but we think there was not such delay on contestant's part in this instance as would justify the application of such an extreme remedy as dismissal for want of prosecution. We do not think the proceeding was dismissed for that reason, but, if it was, there was exhibited a very clear case of abuse of discretion.

2. But it is insisted that even though the reason for the ruling may have been erroneous, the right result was reached, since, it is contended, the statement of contest does not state a cause of action. The statement sets forth at length the facts concerning the division of Valley county into election precincts and the subdivision of certain of the precincts into "polling-places." It gives the vote received by contestant and contestee at each polling-place, except polling-place No. 1, Saco precinct and Poplar precinct.

The first alleged ground of contest is that the contestee's [3] name was not rightfully on the official ballot. This is not a ground of contest (Rev. Codes, sec. 7234), and even if it were, the statement does not contain any facts, but the bald conclusion.

The second ground of contest is not couched in very terse or explicit language, and we are unable to agree with counsel for contestee as to its meaning. It charges "malconduct and [4] misconduct" on the part of the election judges at polling-place No. 1, Saco precinct, in failing to certify the returns as required by section 519, Revised Codes. No facts are stated from which it can possibly be inferred that the failure of the judges of election to certify to the number and names of the persons voting, and the names of candidates and the number of votes received by each, worked any prejudice to contestant, and such irregularity is not sufficient to warrant rejection of the vote of that polling-place. The statute itself so declares. (Secs. 520, 591, 606, and 7235, Rev. Codes.) But the foregoing [5] is not all of the statement of the second ground of contest. It is further alleged that "said board of judges of election and said judges of election of said polling-place were guilty of malconduct and misconduct in the discharge of their duties in that they pretended and represented and returned to the board of canvassers of said Valley county, Montana, the fact that ninety-seven (97) votes had been cast and voted at said election for said defendant, Patrick Nacey, whereas in truth and in fact no votes were cast in said polling-places of said precinct for said defendant, Patrick Nacey." If by this alle-

gation it is intended to charge fraud on the part of the election judges and to assert that contestee did not receive any votes at all in polling-place No. 1 of Saco precinct, but that he received credit for 97 votes which were not cast, and that these 97 votes are necessary to justify the canvassers in their return, then this statement states a cause of action. If, however, it was intended to charge that Nacey received 97 votes in polling-place No. 1, Saco precinct, but that such votes should not be counted for him because of the failure of the election judges to certify the returns, then this count does not state facts sufficient to constitute a cause of action. This count of the statement may be open to a special demurrer, but we are not prepared to say that the pleader did not mean what the language employed fairly expresses.

3. The third ground of contest relates to votes cast at Poplar precinct upon the Fort Peck Indian Reservation. Contestant [6] alleges that the 45 votes received by the contestee at Poplar "were voted and cast by persons who at the time of voting and casting said votes were not residents of the state of Montana, but each and all of said persons, so casting and voting said votes, lived upon and within the Fort Peck Indian Reservation, in said county, and were not in any respect qualified electors." If it be true that votes were cast for contestee by persons who were not residents of Montana and "not in any respect qualified electors," then, of course, such votes should be deducted from the total vote credited to contestee. The canvassers' returns show that Stephens received 1,084 votes and Nacey 1,110 votes. Contestant alleges that he received 1,034 legal votes and that contestee received 968 legal votes, aside from the votes received by contestee from polling-place No. 1, Saco precinct, and from Poplar precinct; so that, to affect the result, it is incumbent upon contestant, under section 7237, Revised Codes, to show that from these two voting places his opponent Nacey received credit for more than 76 votes to which he was not entitled. Under the liberal rules of pleading in force in this state, we think the contestant has stated facts sufficient, if true, to show that Nacey was credited with

97 votes received at polling-place No. 1, Saco precinct, and 45 votes at Poplar precinct, to which he was not entitled, and therefore that a different result will follow, if he is able to prove these allegations.

The judgment is reversed and the cause is remanded for further proceedings.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANBORN concur.

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FRATT ET AL., RESPONDENTS, v. DANIELS-JONES CO. ET AL., APPELLANTS.

(No. 3,264.)

(Submitted May 23, 1913. Decided June 14, 1913.)

[133 Pac. 700.]

*Contracts of Sale—Cancellation—Rescission—Time of Essence of Contract—Breach by Vendee—Part Payment—Forfeiture—Notice—Laches.*

Contracts of Sale—Breach by Vendee—Cancellation—Rescission.

1. An action seeking the enforcement of the provision of a contract of sale of real and personal property that failure on the part of the buyer to meet any deferred payment of the purchase price on the date mentioned therein should work an immediate forfeiture of the contract was not one to rescind, and therefore the rules prescribed by section 5065, Revised Codes, touching rescission, were inapplicable.

Same—Advance Payments—Forfeiture—Equity.

2. In the absence of such a showing by a defaulting purchaser as will appeal to the conscience of a court of equity, he is not entitled to a return of any payment he may have made on the purchase price.

Same—Time of Essence of—Validity.

3. Neither the provision making time of the essence of a contract of sale, nor the contract containing such a provision, is invalid as against positive law or public policy.

Same—Courts will Enforce Contracts as Made.

4. Courts will not undertake to make contracts for parties, different from those which the parties themselves intended, but will enforce a provision making time of the essence of a contract, unless the party for whose benefit it was inserted has waived it or is estopped to insist upon its enforcement, or performance has been prevented by intervening circumstances sufficient to relieve the party from the performance of any other provision of the contract.

Same—Deferred Payments—Notice of Due Date—Laches.

5. Under a contract of sale by the terms of which failure to pay an installment of the purchase price ends the contract, time being expressly declared of the essence of it, notice that an installment has fallen due is not required, and therefore a claim that plaintiff was guilty of laches because of delay in giving it had no merit.

Same.

6. Where a contract of sale provides that the vendor shall have the right to declare it at an end, upon failure by the vendee to make payment on a date fixed, time being expressly made of the essence of the contract, breach by the vendee does not *ipso facto* terminate the agreement, but an election is necessary on the part of the vendor requiring some sort of notice on his part to make the provision effective.

Same—Return of Part Payment—Insufficient Showing.

7. Under the rule declared in paragraph 2 above, *held*, that the showing made by defendant corporation to the effect that its officers were so engrossed with other business that they forgot that a payment was due on a contract of sale, was insufficient to entitle it to relief (Rev. Codes, sec. 6039) from the forfeiture of an advance payment.

*Appeal from District Court, Yellowstone County; George W. Pierson, Judge.*

ACTION by David Fratt and wife against the Daniel-Jones Company and another. From a judgment on the pleadings, defendant company appeals. Affirmed.

*Mr. Wm. V. Beers*, and *Mr. Jesse Van Valkenburg*, submitted a brief in behalf of Appellant; *Mr. Beers* argued the cause orally.

The complaint does not state facts sufficient to constitute a cause of action. There is no allegation to the effect that respondents repaid or offered to repay to appellant the money paid by the latter to the former at the time the contract was executed, and, in other respects, that they placed appellant *in statu quo*. The repayment or offer to repay must appear affirmatively in the complaint. Respondents were not injured or damaged by reason of the nonpayment of the money upon the exact day provided for in the contract, and no injury or damage is alleged by them. In view of the fact that the object of this action is to rescind the contract, it comes within subdivision 2 of section 5065, Revised Codes. "He must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same,



upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so." (*Cotter v. Butte & Ruby Valley Smelting Co.*, 31 Mont. 129, 77 Pac. 509.) "Rescission is the annulling or abrogation of a contract, and may take place either by mutual consent or at the instance of one of the parties in consequence of some default or direction of the other." (2 Warvelle on Vendors, sec. 825.) When a vendee has so failed to perform the contract that the vendor may elect to treat the contract as rescinded, it is incumbent on the vendor to restore to the vendee whatever he has paid on the contract. (*Bohall v. Diller*, 41 Cal. 533; *Lytle v. Scottish-American Mortgage Co.*, 122 Ga. 458, 50 S. E. 402; *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257, 25 Pac. 749; *German Savings Inv. v. De La Vergne R. M. Co.*, 70 Fed. 146, 17 C. C. A. 34; *Phelps v. Brown*, 95 Cal. 572, 30 Pac. 774; *Robinson v. Cheney*, 17 Neb. 673, 24 N. W. 378; *Roberts v. Cheney*, 17 Neb. 681, 24 N. W. 382; *Frink v. Thomas*, 20 Or. 265, 12 L. R. A. 239, 25 Pac. 717; *Vance v. Newman*, 72 Ark. 359, 80 S. W. 574; *Miller v. Steen*, 30 Cal. 402, 89 Am. Dec. 124.)

Respondents seek to enforce an alleged forfeiture which is against the law and against public policy. "It is a universal rule in equity never to enforce either a penalty or forfeiture. On the contrary, equity frequently interposes to prevent the enforcement of a forfeiture at law." (*Kellar v. Lewis*, 53 Cal. 118; *McCormick v. Rossi*, 70 Cal. 474, 15 Pac. 35, 15 Morr. Min. Rep. 433.) "A court will not enforce against a vendee a technical forfeiture of an executed contract for the sale of land, if the defendant offers to do equity in consideration of being restored to his contractual rights." (*Yeiser v. Portsmouth Savings Bank*, 75 Neb. 690, 106 N. W. 784; *Cue v. Johnson*, 73 Kan. 558, 85 Pac. 598.) We submit that the proper decree to be rendered in an action of this character is that the vendee should be required to pay the amount of money due under the contract within a reasonable time to be prescribed by the court or be foreclosed of his equity. (*Button v. Schroyer*, 5 Wis. 598; *Southern Pacific R. Co. v. Allen*, 112 Cal. 455, 44 Pac. 796; *Odd Fellows' Sav. Bank v. Brander*, 124 Cal. 255, 56 Pac.

1109.) In considering a contract for sale of land wherein a forfeiture was being considered, the court said: "The court will usually give him a day, if he desires it, to raise the money, longer or shorter, depending on the particular circumstances of the case, and to perform his part of the agreement." (*Hansbrough v. Peck*, 5 Wall. (U. S.) 506, 18 L. Ed. 520; *Stratton v. California Land & Timber Co.*, 86 Cal. 353, 24 Pac. 1065; see, also, *Flanagan's Estate v. Great Cent. Land Co.*, 45 Or. 335, 77 Pac. 485; *Security Savings & Trust Co. v. McKenzie*, 33 Or. 209, 52 Pac. 1046; *Baker v. Beach*, 15 Wis. 99.)

The contract in question, in so far as it applies to liquidated damages, is void under section 5054, Revised Codes. In considering a contract for the sale of land wherein it was provided that in case of default all moneys paid should be retained by the vendor as liquidated damages, the court held that, "the provision in the contract for liquidated damages was void." (*Easton v. Cressey*, 100 Cal. 75, 34 Pac. 622; *Drew v. Pedlar*, *supra*; *Lytle v. Scottish-American Mortgage Co.*, *supra*; 14 Cyc. 101.)

Appellant is entitled to relief under section 6039, Revised Codes, as against a forfeiture. (*Barnes v. Clement*, 12 S. D. 270, 81 N. W. 301; *Bennett v. Glaspell*, 15 N. D. 239, 107 N. W. 45; *Spaulding v. Hallenbeck*, 39 Barb. 79.)

By the terms of the contract time was made of the essence of the contract. Time was not so far of the essence of the contract as to prevent its enforcement in equity within a reasonable time after the lapse of the time specified. The fact that parties have made time of the essence of their contract does not necessarily preclude the courts from granting relief against such a provision, where it is in the nature of a penalty, or the circumstances render it inequitable to enforce the forfeiture. (*Richmond v. Robinson*, 12 Mich. 201; *Cheney v. Libby*, 134 U. S. 84, 33 L. Ed. 818, 10 Sup. Ct. Rep. 98; *Robinson v. Cheney*, *Roberts v. Cheney*, *supra*; *Dana v. St. Paul Inv. Co.*, 42 Minn. 194, 44 N. W. 55; *Cue v. Johnson*, *supra*; *King v. Seebeck*, 20 Idaho, No. 223, 118 Pac. 292.)

It was incumbent upon the respondents to give appellant notice that the installment due March 26, 1910, would be due on that date and that respondents intended to insist upon a strict performance of the contract. (2 Warvelle on Vendors, 956.) "The necessity of notice upon the rescission of a contract exists only when the party rescinding has received some benefit or advantage from the contract which he must surrender before he can claim to rescind." (Willard's Equity Jurisprudence, Potter's ed., 303.) "When a contract for the sale of land is sufficient to give the vendee the right of possession, his mere failure to make the stipulated payments will not entitle the vendor to immediate possession, without notice of forfeiture or a demand." (*Corning v. Loomis*, 111 Mich. 23, 69 N. W. 85; *Michigan etc. Iron Co. v. Thoney*, 89 Mich. 226, 50 N. W. 845; *Whittier v. Stege*, 61 Cal. 238; *Willis v. Wozencraft*, 22 Cal. 613.)

Respondents were guilty of laches in declaring the alleged forfeiture. It was incumbent upon the respondent to at once claim the forfeiture upon the nonpayment of the installment due March 26, 1910. (*Pier v. Lee*, 14 S. D. 600, 86 N. W. 642; *Gaughen v. Kerr*, 99 Iowa, 214, 68 N. W. 694; *Merriam v. Goodlet*, 36 Neb. 384, 54 N. W. 686; *Buchholz v. Leadbetter*, 11 N. D. 473, 92 N. W. 830.)

*Mr. Wm. M. Johnston*, and *Mr. H. J. Coleman*, for Respondents, submitted a brief; *Mr. Johnston* argued the cause orally.

Our contention, then, is that this is an action to clear plaintiffs' title of a cloud in the shape of an uncompleted and forfeited contract to convey the same. It is not an action of rescission, nor is rescission sought. Plaintiffs are proceeding under the terms of the contract itself. Therefore, it was not incumbent upon plaintiffs to return, or offer to return, that part of the consideration paid, before bringing this action. All the cases cited by appellant under this first specification are those where there is a rescission sought or considered. Assuming for the moment that this is an action of rescission, there are many authorities whose holdings are contrary to the cases cited by appellant. These

cases hold: "It is not necessary that the vendors should return that part of the purchase price which had been paid in order to exercise their option to rescind." (*Grant v. Munch*, 54 Minn. 111, 55 N. W. 902; *McManus v. Blackmarr*, 47 Minn. 331, 50 N. W. 230; *Ketchum v. Evertson*, 13 Johns. (N. Y.) 359, 7 Am. Dec. 384; *Reddish v. Smith*, 10 Wash. 178, 45 Am. St. Rep. 781, 38 Pac. 1003; *Glock v. Howard etc. Co.*, 123 Cal. 1, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713; 29 Am. & Eng. Ency. of Law, 683.) "A vendor who has not parted with the title may recover possession from a defaulting purchaser without first tendering the money or notes already paid or given by the purchaser." (39 Cyc. 1894.) "An answer in ejectment alleging that defendant had contracted with plaintiff for the purchase of the premises and that he had made a partial payment and been let into possession and that plaintiff still retains the amount paid, but not alleging payment in full, or that the remaining purchase money was not yet due, does not show a defense. \* \* \* To allow a defendant in an ordinary action of ejectment to set up matters which did not constitute a defense but are intended merely as a foundation for a money judgment against plaintiff, would be to sanction something unknown to the principles of pleading and practice." (*Hoffman v. Remnant*, 72 Cal. 1, 12 Pac. 804; *Whittier v. Stege*, 61 Cal. 241; *Woodard v. Hennegan*, 128 Cal. 293, 60 Pac. 768; *Crain v. National Life Ins. Co.*, 56 Tex. Civ. App. 406, 120 S. W. 1098.)

Time was of the essence of the contract. Under the decisions cited below, in a contract where time is specifically stipulated to be of the essence of the contract, where the vendee fails to make payment, or keep any covenant at the time set for so doing, the rights of vendee therein end, and the vendor cannot be forced to perform. Therefore, the action for cancellation is simply a right belonging to the vendor to have a null and void contract disposed of so that it will no longer cloud the title to his property. (*Peterson v. Davis*, 63 Kan. 672, 66 Pac. 625; *Chapman etc. Co. v. Wilson*, 91 Ark. 30, 120 S. W. 391; *Spedden v. Sykes*, 51 Wash. 267, 98 Pac. 752; *Arkansas etc. Ry. v.*

*Farmers' etc. Bank*, 21 Okl. 322, 129 Am. St. Rep. 782, 96 Pac. 764; *Uiley v. Wilcox Lbr. Co.*, 59 Mich. 263, 26 N. W. 488; *McGrath v. Gegner*, 77 Md. 331, 26 Atl. 502; *Falls v. Carpenter*, 1 Dev. & B. Eq. (N. C.) 237, 28 Am. Dec. 592; *Grey v. Tubbs*, 43 Cal. 359; *Martin v. Morgan*, 87 Cal. 203, 22 Am. St. Rep. 240, 25 Pac. 350; *Glock v. Howard etc. Co.*, 123 Cal. 1, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713; *Williams v. Long*, 139 Cal. 186, 72 Pac. 911.)

In regard to appellant's position with reference to stipulated damages, we wish, first, to call the attention of the court to the fact that this is not an action brought to enforce the forfeiture of the money paid on the contract. The court is not called upon to make any decision in regard to this money.

Further, we wish to call the court's attention to the cases of *Glock v. Howard etc. Co.*, *supra*, and *Hansbrough v. Peck*, 5 Wall. (U. S.) 497, 18 L. Ed. 520. Both these cases hold that the provision of a contract providing that payments made shall be treated as liquidated damages in case of default by the purchaser, have no effect whatever, as the position of the parties, upon the default by the purchaser, would be the same whether that clause were inserted or left out.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On March 26, 1909, David Fratt and wife entered into a contract in writing with the Daniels-Jones Company, a corporation, by which they sold and agreed to convey to the company Sec. 7, Tp. 4 N. R. 25 E., for \$6,370, payable \$637 in cash and the balance in ten equal annual installments, with interest at the rate of six per cent per annum, payable annually. The vendee was to have possession on May 15, 1909, and was to pay all taxes upon the land after the year 1909. The contract contains this provision: "It is hereby expressly understood and agreed that time is of the essence of this contract and if the party of the second part fails to pay any deferred installment, with interest thereon, or any portion thereof, when the same becomes due and payable, such failure shall work an immediate forfeiture

of this contract, without any notice whatever, and the money paid on this contract shall be retained by the parties of the first part as liquidated damages." In 1911 this suit was instituted. The complaint states two causes of action. The first contains the usual allegations in an ordinary suit to quiet title; and the second sets forth the facts concerning the execution of the contract, copies the agreement at length, alleges that the defendant Daniels-Jones Company entered into some kind of an agreement to sell the property to the defendant Luke, that the defendant Daniels-Jones Company failed to pay the installment of the purchase price and interest due March 26, 1910, and failed to pay the taxes for that year; that plaintiffs notified the company soon after March 26, 1910, and took possession of the property. There are certain allegations of the complaint and certain portions of the prayer which relate to the defendant Luke alone, and further reference to which is omitted. The prayer is that the defendants be required to set forth the nature of their claim for adjudication; that plaintiffs' title be quieted; that the contract of March 26, 1909, be canceled, and that the defendants be enjoined from asserting any interest or claim to the property by reason of such contract. The answer of defendant Daniels-Jones Company contains some general admissions and denials, and then sets forth affirmatively, and at length, the facts concerning the execution of the contract of March 26, 1909; alleges that the company took possession of the land in controversy on May 15, 1909, and thereafter continued in such possession; that it paid plaintiff \$637 upon the execution of the contract; that it did not pay the installment due March 26, 1910, because the company's officers were engrossed with other business, and overlooked the fact that a payment was then due; that while it did not pay the taxes for the year 1910, it intended to pay them before they became delinquent if the plaintiffs had not paid them; that on July 22, 1910, it received from the plaintiffs notice, signed by the plaintiff David Fratt, which after referring to the contract of March 26, 1909, continued: "You have forfeited your part of the contract by failing to pay the deferred payment that came due March 26th, 1910";

that immediately thereafter it tendered to the plaintiffs the amount due with interest but the tender was refused; that again in March, 1911, it made another tender of the amount then due and this was also refused; that plaintiffs have never repaid the \$637 paid on the purchase price at the time the contract was executed, or any part thereof; that the land has increased in value, and that the company is now ready, able and willing to pay the amount which may be found due by the court. The reply does not raise any material issues. Plaintiffs moved the court for judgment on these pleadings, and this motion was granted and a decree rendered and entered according to the prayer of the complaint. It is from that judgment that the defendant Daniels-Jones Company appealed.

1. Counsel for appellant contend that the complaint does not state facts sufficient to constitute a cause of action for the re-[1] scission of a contract, and cite section 5065, Revised Codes, and authorities applying the rules there announced, but they misapprehend the character of this suit. Plaintiffs are not seeking to rescind the contract; they are relying upon it and upon the provision for its own termination automatically upon the failure of appellant to meet the requirements imposed, and are now asking the court to decree that the contingency has arisen which by the terms of the contract render it of no further force or effect. They ask, further, that the contract, as a menace to their title, be canceled. The purpose of such an action is so far distinct from that of one to rescind a contract that the rules governing rescission do not have any application here. The question is not a new one in this state. It has been considered a number of times. (*Clark v. American D. & M. Co.*, 28 Mont. 468, 72 Pac. 978; *Merk v. Bowery Min. Co.*, 31 Mont. 298, 78 Pac. 519; *Arnold v. Fraser*, 43 Mont. 540, 117 Pac. 1064; *Cook-Reynolds Co. v. Chipman*, ante, p. 289, 133 Pac. 694.)

2. Counsel for appellant contend also: "That this action seeks to enforce a forfeiture which is against the law and against public policy: 1. As to liquidated damages. 2. As to time of essence of contract. 3. As to necessity of giving notice." But again they are mistaken as to the character or purpose of this

action. Plaintiffs are not asking the court to declare the payment of \$637 forfeited to them, and the judgment entered does not make any disposition of that sum or mention it at all. The language of the contract quoted above, in which the word "forfeiture" appears, does not mean anything more than that upon the failure of this appellant to keep and perform the terms of the contract by it to be kept and performed, and within the time limited, the contract thereupon terminates.

(a) It is said that in so far as the contract provides for liquidated damages it is void and of no effect under section 5054, Revised Codes. This may be conceded, but still it does not avail the appellant, for, as said before, there is not any contention by plaintiffs that the amount paid to them shall be forfeited, and neither is there any adjudication upon the subject. But in [2] any event, in the absence of a showing on the part of the defaulting purchaser such as would appeal to the conscience of a court of equity, he is not entitled to a return of the part payment of the purchase price even though he asked for it, and that was not done in this instance. (*Perkins v. Allnut*, 47 Mont. 13, 130 Pac. 1; *Clifton v. Willson*, ante, p. 305, 132 Pac. 424; *Cook-Reynolds Co. v. Chipman*, above.)

(b) That neither the provision "time is of the essence of [3] this contract" in a contract, nor the contract containing such a provision, is invalid as against positive law or public policy is too well settled to merit serious consideration. At common law such a provision was read into every contract, but in equity the rule was that it must appear affirmatively that the parties regarded time as of the essence of their agreement or courts of equity would not so regard it. (2 Page on Contracts, secs. 1160, 1161.) To set the question at rest and to avoid giving expression to an intention which the parties may not have entertained, our Code (section 5047, Rev. Codes) declares: "Time is never considered as of the essence of a contract, unless by its terms expressly so provided." This is a distinct recognition of the right of parties to a contract to include such a provision, and when it is included, as in the present instance, it is the duty of courts to carry out the intention of the parties



by giving effect to that provision; for to ignore or circumvent it when deliberately written into a contract by the parties, or by any sort of construction to nullify its effects is to make a new contract for the parties, different from the one which they themselves constructed—something even a court of equity is not authorized to do. This is the rule declared by the supreme court of the United States in *Cheney v. Libby*, 134 U. S. 68, 33 L. Ed. 818, 10 Sup. Ct. Rep. 498, which was a suit in equity to compel specific performance of a contract to convey land. The court said: "The parties in this case, in words too distinct to leave room for construction, not only specify the time when each condition is to be performed, but declare that 'time and punctuality are material and essential ingredients' in the contract; and that it must be 'strictly and literally' executed. However harsh or exacting its terms may be, as to the appellee, they do not contravene public policy; and, therefore, a refusal of the court to give effect to them, according to the real intention of the parties, is to make a contract for them which they have not chosen to make for themselves."

In 1 Pomeroy's Equity Jurisprudence, third edition, section 455, the same rule is stated as follows: "It is well settled that where the parties have so stipulated as to make the time of payment of the essence of the contract, within the view of equity as well as of the law, a court of equity cannot relieve a vendee who has made default. With respect to this rule there is no doubt." The phrase "time is of the essence of this contract" is employed for the benefit of the vendor (*Dana v. St. Paul Investment Co.*, 42 Minn. 194, 44 N. W. 55), and, being for his special benefit, he may waive the provision or by his conduct estop himself to insist upon its enforcement. In *Cue v. Johnson*, 73 Kan. 558, 85 Pac. 598, it was held that the failure to insist upon the enforcement of the provision when appealed to for further time and by tacitly extending the time for performance as requested by the vendee, the vendor waived his right to insist upon the enforcement of the clause which made time of the essence of the agreement. In *Robinson v. Cheney*, 17 Neb. 673, 24 N. W. 378, there was involved a contract for the sale of real estate upon

installments. Notes were executed for the deferred payments and these were made payable at a particular bank. When the notes maturing August 27, 1883, became due, the vendor failed to have them at the bank, and the court held that by this failure on his part, the vendor waived his right to insist upon payment on that particular day as provided in the contract. In *Cheney v. Libby*, above, a court of equity intervened to save the purchaser who had not complied literally with the terms imposed upon him by his contract, but only upon the ground that by his course of conduct the vendor had misled him into the belief that a strict or literal compliance would not be insisted upon, with the result that it would have been unconscionable to have permitted the vendor to profit at the vendee's expense. Probably the supreme court of Pennsylvania went further than it is necessary for us to go in this instance, when, in *Miller v. Phillips*, 31 Pa. 218, it is said: "Where the parties choose by clear and explicit terms to make time of the essence of the contract, performance to be entitled to compensation must be within it, and nothing but the act of God, rendering compliance physically impossible, will excuse a failure." These cases are cited to [4] show that courts will not undertake to make contracts for parties, different from those which the parties themselves intended, but that they will enforce a provision making time of the essence of a contract, unless the party for whose benefit it was inserted has waived the provision or is estopped to insist upon its enforcement, or performance has been prevented by some intervening circumstances sufficient to relieve the party from the performance of any other provision of the contract.

(c) Proceeding upon the assumption that this is a suit to rescind, counsel for appellant complain that plaintiffs failed to notify appellant that the payment of March 26 would be due upon that day, and that strict compliance with the terms of the contract would be insisted upon. There is not anything in the contract to impose any such duty upon the vendors, and, as we have already determined that this is not a suit to rescind, nothing further need be said upon this subject.

Counsel for appellant further contend that plaintiffs were [5, 6] guilty of laches in failing to take action until July 22 after the default of March 26, and cases are cited which hold that the failure of the vendor to act for two or three months after a payment becomes due will be held to constitute a waiver. But counsel fail to discriminate between a contract like the one now under consideration, by the very terms of which the failure to pay an installment when due *ipso facto* ends the contract, and one which provides that upon the failure of the vendee to make payment on time, the vendor shall have the right to declare the agreement at an end, time being expressly made of the essence of each contract. Recalling that this last provision is for the benefit of the vendor, the difference in the two classes of contracts becomes manifest at once. Under an agreement of the first class the breach by the vendee terminates the contract unless the vendor elects to waive the time provision and continue the agreement in force. Under such a contract notice is not required unless the vendor elects to continue it in force. Under a contract of the second class the breach by the vendee does not *ipso facto* terminate the agreement. It merely creates the condition under which the vendor may terminate it if he elects to avail himself of the power conferred; but an election is necessary on his part to the termination of the agreement, and notice of some sort of such election is necessary to make it effective. (*Gaughen v. Kerr*, 99 Iowa, 214, 68 N. W. 694; *Pier v. Lee*, 14 S. D. 600, 86 N. W. 642.) Since the contract under consideration was terminated by the default of the Daniels-Jones Company, notice was not necessary, and fault cannot be found with the plaintiffs for their delay in giving a notice which they were not required to give.

Our attention is directed to section 6039, Revised Codes, which [7] provides for relief from a forfeiture or loss in the nature of a forfeiture. Whatever may be the correct interpretation of the language of that section, this much is apparent: the very minimum requirement is that the party invoking the protection afforded by that section must set forth facts which will appeal to the conscience of a court of equity. "He may be relieved upon a

showing that he is equitably entitled to such relief, if his breach of duty was not grossly negligent, willful or fraudulent." (*Cook-Reynolds Co. v. Chipman*, above.) In the present instance the only excuse offered by the Daniels-Jones Company for its default is that its officers, being engrossed with other business, forgot that a payment was due March 26, 1910. Apparently they continued to forget for the ensuing four months. It appears affirmatively that the defendants had possession of the land for more than a year. There was but \$637 paid on the purchase price. The value of the use of the premises does not appear; and even conceding that these are proper subjects of consideration in a case of this character—and upon that we do not express any opinion at all—yet, when all is said by appellant that can be said in its behalf, it failed to make any excuse or to disclose wherein the conscience will be shocked by permitting the plaintiffs to take advantage of the term in the contract which made time of its essence. If the facts disclosed here will excuse, then the provision so carefully inserted in this contract to compel performance at the precise time indicated becomes a dead letter. If these facts are sufficient to relieve a defaulting party, then any sort of excuse is sufficient. But, as we have indicated above, when parties deliberately make time of the essence of their agreement, the obligor must expect that the provision will be given full force and effect, unless the party for whose benefit it was inserted waives the provision or by a course of conduct estops himself to insist on its enforcement, or the obligor is prevented from performing by circumstances which would be sufficient to relieve him from the performance of the most important provision of the contract.

The answer interposed does not constitute any defense, and the judgment of the district court is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

**WALTERS, RESPONDENT, v. CHICAGO, MILWAUKEE & PUGET SOUND RY. CO. ET AL., APPELLANTS.**

(No. 3,261.)

(Submitted May 22, 1913. Decided June 14, 1913.)

[133 Pac. 357.]

*Personal Injuries—Railroad Crossings—Automobiles—Duty of Driver—Contributory Negligence—Evidence—Excessive Verdicts.*

**Personal Injuries—Railroad Crossings—Warning—Positive and Negative Testimony—Effect.**

1. *Held*, in an action for damages sustained in a railroad crossing accident, that the negative character of the testimony of plaintiff's witnesses to the effect that they heard no bell rung or whistle sounded as the train approached the crossing, which was opposed to the positive statement by defendant company's employees that warning was given, did not render it insufficient to warrant the submission of the case to the jury or authorize a finding in favor of plaintiff.

**Same—Automobiles—Care Required of Driver—Contributory Negligence.**

2. The driver of an automobile may not, in the absence of express statute, be held guilty of contributory negligence, as a matter of law, for failing to stop, look and listen when approaching a railway crossing, his duty in this regard going no further than to exercise such care and caution for his own safety as might be expected of an ordinarily prudent person under like circumstances.

**Same—Contributory Negligence—Evidence.**

3. Evidence *held* not to necessitate the conclusion that plaintiff was guilty of contributory negligence in attempting to drive an automobile over a railway crossing situated in a cut from eight to twelve feet deep, where he was struck by a train running from forty-five to fifty-five miles an hour.

**Same—Excessive Verdict.**

4. Plaintiff at the time of the accident was twenty-three years of age, earning \$125 per month. The injuries received were such as to forever prevent him from pursuing his trade of stereotyper. At the time of the trial he was earning \$80 per month. His earning capacity had been totally destroyed for about one year. His injuries were serious, one of their effects being a shortening and partial paralysis of one of his legs. *Held*, that a verdict for \$15,000 was not so excessive as to evince passion and prejudice.

*Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.*

**ACTION** by Charles Walters against the Chicago, Milwaukee & Puget Sound Railway Company and another. Judgment for plaintiff. Defendants appeal from the judgment and from an order overruling a motion for new trial. **Affirmed.**

Mr. George F. Shelton, Mr. Fred J. Furman, and Mr. A. J. Verheyen, for Appellants, submitted a brief; Mr. Furman argued the cause orally.

Since the introduction of automobiles, the various courts which have had under consideration crossing accidents have adopted a most rigid rule in fixing the degree of care necessary to be exercised by drivers of automobiles. The courts have required that the driver of an automobile approaching a railway crossing shall be held rigidly to the requirement that he stop, look and listen for an approaching train; and that a failure on his part to do so precludes a recovery, in case of accident. They have held that the automobile is absolutely under the control of the driver. It can be stopped at any point instantaneously. It can be started at any time and at any place. It is a mechanical contrivance, entirely under the control of the driver, and responds immediately and readily to his will. Whatever modification may have been made with reference to the drivers of teams approaching a railway crossing has been held not to apply to automobiles. The machine is directly subject to the will and control of the driver; and a failure on his part to stop his car at a railway crossing and look and listen for an approaching train is such negligence as precludes a recovery, in case of a collision. (28 Cyc. 41; *Brommer v. Pennsylvania R. Co.*, 179 Fed. 577, 29 L. R. A. (n. s.) 924, 103 C. C. A. 135; *New York Cent. & H. R. R. Co. v. Maidment*, 168 Fed. 21, 21 L. R. A. (n. s.) 794, 93 C. C. A. 413; *Spencer v. New York Cent. & H. R. R. Co.*, 123 App. Div. 789, 108 N. Y. Supp. 245; affirmed in 197 N. Y. 507, 90 N. E. 1166; *Benert v. Long Island R. Co.*, 145 App. Div. 552, 130 N. Y. Supp. 271; *Read v. New York Cent. & H. R. R. Co.*, 123 App. Div. 228, 107 N. Y. Supp. 1068; *Horandt v. Central R. R. Co. of N. J.*, 78 N. J. L. 190, 73 Atl. 93; *Chase v. New York Cent. Ry. Co.*, 208 Mass. 137, 94 N. E. 377; Huddy on Automobiles, 3d ed., sec. 164.)

The driver of any vehicle approaching a railway crossing must look and listen for an approaching train, and, where necessary in the exercise of ordinary care and caution, must stop his

vehicle; and a failure to do so precludes a recovery. (*Sprague v. Northern Pacific Ry. Co.*, 40 Mont. 481, 107 Pac. 412; *Hunter v. Montana Cent. Ry. Co.*, 22 Mont. 525, 57 Pac. 140.)

There was no sufficient, or any, testimony introduced on the part of the plaintiff to prove a failure on the part of the defendants to ring the bell and sound the whistle; and the submission to the jury of the question of negligence on the part of the defendants in the case was error. The testimony upon the question of whether the bell was rung and the whistle sounded, in the case, divides itself into two classes. On the one hand, the testimony on the part of the defendants is clear and absolute that the bell was rung and the whistle sounded; on the other, the testimony on the part of the witnesses for the plaintiff is negative, that they did not hear it. Our contention is that there was not sufficient evidence to raise an issue that might properly be submitted to the jury in this regard; and the court erred in submitting to the jury this question; but, if the matter was properly submitted to the jury, the jury could not, under the instructions of the court, disregard the positive statements of the witnesses that the bell was rung and the whistle sounded. (*Chase v. New York Cent. Ry. Co.*, 208 Mass. 137, 94 N. E. 377; *Horandt v. Central R. R. Co. of N. J.*, *supra*.)

*Messrs. Maury, Templeman & Davies*, for Respondent, submitted a brief; *Mr. H. L. Maury* and *Mr. J. O. Davies* argued the cause orally.

Whether plaintiff at the time of the accident was exercising the care required of him by law was a question for the jury. (*Lorenz v. Burlington etc. Ry. Co.*, 115 Iowa, 377, 56 L. R. A. 752, 88 N. W. 835; *Wheeler v. Oregon R. & N. Co.*, 16 Idaho, 375, 102 Pac. 347; *Grant v. Oregon R. & N. Co.*, 54 Wash. 678, 25 L. R. A. (n. s.) 925, 103 Pac. 1126; *Thompson v. New York Cent. R. Co.*, 110 N. Y. 636, 17 N. E. 690; *Greenwaldt v. Lake Shore etc. Ry. Co.*, 165 Ind. 219, 74 N. E. 1081; *Alabama etc. Ry. Co. v. Lowe*, 73 Miss. 203, 19 South. 96.) We also desire to call the court's attention to the case of *Pendroy v. Great Northern R. R. Co.*, 17 N. D. 433, 117 N. W. 531. This is an automobile

case, and is frequently cited by the courts and by text-writers on automobiles, as laying down the proper rule of conduct for the automobile driver approaching a railroad crossing. In this case the plaintiffs did not stop nor look. They listened, but heard no train. They were injured. The court held that the question of plaintiff's negligence was one for the jury. See, also, *Texas etc. Ry. Co. v. Hülgartner* (Tex. Civ. App.), 149 S. W. 1091, also an automobile case, which lays down the same rule of law for automobile drivers as for other travelers over a public road. (*Allen v. Boston etc. R. Co.*, 197 Mass. 298, 83 N. E. 863; *Hartman v. Chicago etc. Ry. Co.*, 132 Iowa, 582, 110 N. W. 10; *Louisville etc. R. Co. v. Lucas*, 30 Ky. Law Rep. 539, 99 S. W. 959; *Central etc. Ry. Co. v. Hyatt*, 151 Ala. 355, 43 South. 867; *Vance v. Atchison etc. Ry. Co.*, 9 Cal. App. 20, 98 Pac. 41; *Missouri etc. Ry. Co. v. James*, 55 Tex. Civ. App. 588, 120 S. W. 269; *Chesapeake etc. Ry. Co. v. Hawkins* (Ky.), 124 S. W. 836; *Crabtree v. Missouri etc. R. Co.*, 86 Neb. 33, 136 Am. St. Rep. 663, 124 N. W. 932; *Farris v. Southern R. Co.*, 151 N. E. 483, 66 S. E. 457.)

After the plaintiff had passed the Cauty automobile as before said, he slowed down his automobile, shut off the power. It had rubber tires, and he affirms that he could hear the approach of a train as well with his automobile going as he could with it standing still. Under these circumstances the exercise of ordinary care on his part did not require him to stop. (*Kujawa v. Chicago etc. Ry. Co.*, 135 Wis. 562, 116 N. W. 249; *New York etc. R. Co. v. Moore*, 105 Fed. 725, 45 C. C. A. 21.)

If a person approaches a railroad crossing at a place where he cannot himself see up and down the track, and sees persons working at the crossing or passing to and fro over the crossing with apparent safety to themselves, it is, to a certain extent, an assurance of safety to the person who is not in a position to see the railroad, and sufficient to cause a person to relax his vigilance and perhaps fail to take some precautions which he otherwise might take; and this is a circumstance which is also recognized by the law. (*Henry v. Cleveland etc. Ry. Co.*, 236 Ill. 219, 86 N. E. 231.)



And the cases generally hold that it is not necessary for plaintiff to look for a train where it is impossible for him to see. (*Vance v. Atchison etc. Ry. Co.*, 9 Cal. App. 20, 98 Pac. 41; *Central of Georgia Ry. Co. v. Hyatt*, 151 Ala. 355, 43 South. 867.) Even though, under the evidence in the case, the court should be of the opinion that there would be four or five feet space between the front wheels of plaintiff's automobile and the track when plaintiff reached the place where he would be able to see up and down the track, still the court could not say as a matter of law that he was guilty of negligence in failing to discover the train in this short space. (*Erie R. R. Co. v. Schultz*, 183 Fed. 673, 106 C. C. A. 23.)

The presumption is, that all men act rightly until the contrary appears. It is often expressed in the maxim "*Omnia prae-sumunter rite esse acta*"; and from this follows another proposition of the law, that no person is in the law bound to anticipate injury from the negligence of another. Under these presumptions the plaintiff in this case, when he approached the railroad crossing in question, had a right to presume and rely upon the presumption that the defendant would perform its duties under the law, and would ring the bell on its locomotive and blow the whistle as required by law, and this is peculiarly true where the crossing, like the crossing in question, is an obscure one. (*Henry v. Cleveland Ry. Co.*, *supra*; *Cleveland etc. Ry. Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37; *Malott v. Hawkins*, 159 Ind. 127, 63 N. E. 308; *Illinois Cent. R. Co. v. Moss*, 142 Ky. 658, 134 S. W. 1122; *Moore v. Wabash R. Co.*, 157 Mo. App. 53, 137 S. W. 5; *Toledo etc. R. Co. v. Lander*, 48 Ind. App. 56, 95 N. E. 319; *Lewis v. Rio Grand Western Ry. Co.* (Utah), 123 Pac. 97.)

MR. JUSTICE SANNER delivered the opinion of the court.

At about 6:12 P. M., on July 28, 1910, the respondent, while driving a Ford runabout, was struck on a public road crossing between Butte and Anaconda by one of appellant company's trains. His companion was instantly killed and he seriously injured. To recover for such injuries he brought this action, alleging as negligence on the part of appellants that they were

running the train at excessive speed and that they failed to blow the whistle, ring the bell or give any alarm of its approach. Respondent had a verdict for \$15,000, upon which judgment was entered. This appeal is from that judgment and from an order overruling a motion for new trial.

1. It is claimed that the evidence of appellants' failure to sound the whistle or ring the bell was insufficient to take the case to the jury, and that in the face of positive testimony that the whistle was sounded and the bell rung, the jury were not [1] authorized to find for the respondent. It is quite true that the testimony of the engineer and other employees of the appellant company is positive and that of one other witness rather ambiguous, to the effect that the bell was rung and the whistle sounded in the regular way at from fifty to eighty rods from the crossing. The respondent, however, testified that as he approached the crossing and for some time before reaching it he was alert for any warning, having both looked and listened for the approach of a train, and that the whistle was not sounded nor the bell rung. D. M. Canty, who with his brother and niece had made the crossing a very few seconds before and who were only twenty or thirty feet away, whose hearing was good and who heard the sound of the train as it struck the respondent's machine, testified that he heard no whistle, nor bell nor other warning of the train's approach; and James A. Canty also testified that he heard no whistle nor bell, though he hears all sounds plainly and distinctly. The niece, Miss Dugan, testified to similar effect. The sufficiency of the foregoing to raise an issue, and the present contention of appellants against it are alike settled in *Riley v. Northern Pac. Ry. Co.*, 36 Mont. 545, 93 Pac. 948. At page 559 of that decision Mr. Justice Smith, speaking for this court, said: "Appellant affirms that it was proven by the uncontradicted evidence that the bell was ringing, and that there was a headlight upon the rear of the switch-engine. On the part of the defendant there was positive testimony that the bell was ringing and the light burning. The plaintiff's witnesses simply testified that they did not hear any bell or see any light. Appellant argues that this negative testimony is of no weight, in

view of the positive testimony opposed to it. Ordinarily, when one witness testifies positively that a certain thing existed or happened, and another witness, with equal means of knowing, testifies that the things did not exist or happen, the so-called negative testimony is so far positive in its character that a court could not say that it was entitled to less weight than the affirmative testimony."

2. The testimony of respondent tended to show that while he looked and listened as he approached the crossing, he did not [2] "stop, look and listen," and the question is presented by appellants whether the driver of an automobile approaching a railway crossing is not charged with the absolute duty to "stop, look and listen." The appellants, conceding that as to other vehicles using a public highway, the general rule upon approaching a railway crossing is to exercise such care and caution as might be expected of an ordinarily prudent person under the circumstances, insist that "the duty of an automobile driver approaching tracks where there is restricted vision, to stop, look and listen, and to do so at a time and place where stopping, and where looking, and where listening will be effective, is a positive duty." (*New York Central & H. R. Co. v. Maidment*, 168 Fed. 21, 21 L. R. A. (n. s.) 794, 93 C. C. A. 413; *Brommer v. Pennsylvania R. Co.*, 179 Fed. 577, 29 L. R. A. (n. s.) 924, 103 C. C. A. 135.) Both of the decisions just cited emanated from the circuit court of appeals for the third circuit, speaking through Judge Buffington, and they proceed upon the mistaken ideas that a railroad has some sort of a paramount right to the use of a public highway crossing, and that whether a citizen using the highway on approaching such crossing must stop, look and listen, depends upon the motive power he is using and its amenability to control; whereas the true rule, as we understand it, is that the citizen has an equal right with the railway company to use the crossing, and the amenability to control of the motive power he is using bears more properly upon how near he may come to the place of danger before taking the precautions that common prudence generally requires. Of these cases nothing further need be said than this: If they are to be taken to hold, in the ab-

sence of express statute, that it is contributory negligence as a matter of law for the driver of an automobile not to stop, look and listen before using a highway crossing, without regard to whether ordinary prudence would require such a course, they are contrary in spirit to the rule announced by the superior authority of the supreme court of the United States (*Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 36 L. Ed. 485, 12 Sup. Ct. Rep. 689), are against the weight of general decision (*Texas etc. Ry. Co. v. Hilgartner* (Tex. Civ. App.), 149 S. W. 1091; *Pendroy v. Great Northern Ry. Co.*, 17 N. D. 433, 117 N. W. 531; *Spencer v. New York Central & H. R. Co.*, 123 App. Div. 789, 108 N. Y. Supp. 245; *Bonert v. Long Island R. Co.*, 145 App. Div. 552, 130 N. Y. Supp. 271; *Hartman v. Chicago G. W. Ry. Co.*, 132 Iowa, 582; 110 N. W. 10; *Louisville & N. R. Co. v. Lucas*, 30 Ky. Law Rep. 539, 99 S. W. 959; *Vance v. Atchison etc. Ry. Co.*, 9 Cal. App. 20, 98 Pac. 41; *Missouri etc. Ry. Co. v. James*, 55 Tex. Civ. App. 588, 120 S. W. 269; *Chesapeake & O. R. Co. v. Hawkins* (Ky.), 124 S. W. 836), and are in conflict with the settled rule in this state. (*Mason v. Northern Pac. Ry. Co.*, 45 Mont. 474, 124 Pac. 271; *Sprague v. Northern Pac. Ry. Co.*, 40 Mont. 481, 107 Pac. 412; *Hunter v. Montana Central Ry. Co.*, 22 Mont. 525, 57 Pac. 140.) In the *Sprague Case* appears the following: "Whether, in selecting the point which they did select to stop and listen for approaching trains, Nelson and Chappel exercised ordinary care to make their listening effective, and whether in doing what they did, from that point until the injury occurred, they exercised such care and prudence as reasonable men under like circumstances would have exercised, were questions of fact for the jury to determine"; and in the *Mason Case* this court, disapproving of certain instructions, said: "Neither of these instructions correctly states the law. They imposed too great a burden upon the plaintiff. If such were the law, a person approaching a railroad track would either be obliged to keep a constant lookout in both directions, or it would be incumbent upon him, in order to avoid the imputation of contributory negligence, to stop, if necessary, and look for a train at the last available point, and at the last moment of time

before crossing the track. The law is that one desiring to cross a railroad track must exercise reasonable care for his own safety." We see no reason to change these rules either for or against any class of vehicles in lawful use.

3. The passages just quoted are decisive also of the third contention of appellants, viz., that the particular circumstances required respondent to stop, look and listen, and that, as he did not stop at all, nor look and listen where such looking and listening would have revealed the approach of the train, he is *ipso facto* convicted of contributory negligence. The argument, although not so expressed, seems to be that if the respondent's view as he neared the crossing was restricted so that he could not see whether a train was coming, he should have proceeded, with his machine under such control as that he could instantly stop, to a point between the walls of the cut and the track where he could see, and there look and govern himself accordingly, or that he should have stopped his machine, gone forward into the cut afoot and ascertained whether the coast was clear; or, if a train coming from Butte toward the cut was visible, then failure to see it was due to failure to look at the right time and place—and in either case there can be no recovery under the *Sprague* and *Hunter* decisions. A short review of the salient features of the case will disclose that the matter is not so easily settled. The respondent was struck by a passenger train which had left Butte shortly before and was running at not less than forty-five nor more than fifty-five miles an hour. The crossing is in a cut variously estimated at from eight to twelve feet deep at that point, which cut extends from the crossing eastward about 1,000 feet. The county road east of the crossing follows the general contour, which is about the same as the top of the cut, to a point about 125 feet from the crossing; there the approach to the crossing begins, and it consists of another cut (at a right angle to the railway cut), through which the county road gradually descends from the general level to the level of the track. According to respondent, a train approaching the cut from Butte is visible to the traveler on the county road from where the approach to the crossing begins back

to a point one-eighth to one-fourth of a mile distant; after proceeding into the approach a little distance such a train could not be seen, whether in or out of the cut; nor could such a train coming into the cut be seen before the traveler on the county road reached the point above mentioned, one-eighth to one-fourth of a mile from the cut; when he reached this space he took "a reasonably long look" to the east for a train and saw nothing; he then looked westward with the like result; he then looked forward and being at the approach to the cut saw the Canty machine coming toward him; alert then for any warning or sound of a train, anxious also to avoid meeting the Canty machine on the crossing, he checked his speed, descended slowing and quietly toward the track, saw the other machine pass safely over the track, passed the other machine about twenty or thirty feet from the crossing and, still listening for a train, reached the track where the accident occurred. He also testified that to see a train after once entering the approach to the crossing he would have to proceed to a point where his front wheels would be on the track; that there is a curve in the track where it enters the east end of the cut and that to stop his car, walk forward to the crossing to view the track, return to the car and make the crossing would require from two to five minutes. By way of maps, profiles and photographs there is evidence on behalf of appellants to show that when a passenger train is in the cut, about six feet of it projects above the top of the cut. East of the crossing, between the county road and the cut, are a pole fence and the right of way fence, built of posts and wire; these to some extent obstruct the view, and while we think that a train drifting downgrade through the cut is visible to one on a level with the top of the cut whose attention was drawn to it, it would not be obtrusive without some warning. The witness Nick testified that he could stand in the county road at a point eighty feet from the track and still see a passenger train coming from the east; but how much above or below his eyes would be the eyes of the respondent sitting in a Ford runabout does not appear. There was also testimony that the curve in the track just east of the cut is a three-degree curve; that from

the east end of the ties at the crossing to the wall of the cut is eleven feet; that the distance from the front edge of the front wheel to the seat of a Ford Runabout is five feet six inches, and that the width of a passenger coach is ten feet, so so that it extends over either side about one foot beyond the end of the ties.

Doubtless the case made by appellants was sufficient to defeat a recovery; but it must be remembered that if any substantial conflict existed in the evidence, this court will not substitute its views for those of the jury, who were the judges of the weight and credibility of respondent's showing. If they believed that the curve to the east of the cut prevented a view from the crossing much beyond the end of the cut (1,000 feet away), and that it would take the respondent not less than two minutes to stop his machine, go to the track, take his view, return to the machine and cross, it is quite clear that such a proceeding, unless the train was in the cut, would induce a false rather than a real security, because a train approaching at forty-five or fifty-five miles an hour would traverse the entire visible distance in not to exceed thirteen seconds. If the jury believed that it was not feasible for the respondent—either from lack of knowledge or because of the narrow margin of safety as disclosed by the appellants' own measurements—to stop his machine at a point within the cut where he could have a view without getting off, then he could not be convicted of negligence for failure to do that; and if the jury believed that the respondent did before descending into the cut take a reasonably long look from a point where he says a view was of any value, the facts that he took that look before instead of after his look in the other direction—which in due care he was also bound to take—and that thereafter, though still listening for the possible approach of a train, he gave some attention to the Canty machine—which it was also his duty to avoid and which he saw pass the track in safety—would certainly not necessitate the conclusion that he was guilty of contributory negligence in attempting to cross the track. Crediting the testimony of the engineer and others that the crossing of the Canty machine

elicited two blasts from the whistle of the train, it might well be said that the respondent hearing them and nevertheless proceeding, was chargeable with negligence as a matter of law; but if it be true that the whistle was not sounded then or at all, nor the bell rung, as the respondent and the occupants of the Cauty machine say, then the very passage of Cauty unchallenged, in the absence of information to the contrary, was some assurance to the respondent that the crossing was safe.

From the views above expressed it follows that no error was committed by the trial court in overruling the motion for nonsuit, or in modifying appellants' offered instructions 2a and 4a, or in refusing appellants' offered instructions 5a and X. The instructions given were undoubtedly correct so far as they went; and if there was any error in failing to more specifically define the care required of the respondent, it is unavailing to the appellants, since no proper instruction on this subject was offered by them. We see nothing in the other rulings complained of to warrant a reversal of this case.

4. We are then brought to the verdict which appellants assert is unreasonable and excessive. At the time of the accident the respondent was twenty-three years of age, was a stereotyper by trade, having spent several years in learning that business, and was earning \$125 per month. By the injuries received in the accident he is forever barred from again pursuing his trade and at the time of the trial was earning \$80 per month running a moving-picture machine. We have here an established loss of \$45 per month, or \$540 per year, and to purchase an annuity equal to this amount would require approximately \$11,000. In addition to this the respondent suffered a total loss of earning capacity for about a year. When struck by the train he was thrown seventy-five feet; his hip socket was fractured, his skull slightly fractured; he sustained other severe external bruises and suffered internal hemorrhages from the intestines and kidneys; he was unconscious for six or eight hours, confined five weeks to his bed, compelled to use crutches for five or six months and a cane for three or four months thereafter. It was a year before he walked without



help. His pain for several weeks was severe; his nervous system sustained serious shock; he has a displacement of the pelvic bone and of the lower spinal processes, causing atrophy, shortening and partial paralysis of one of his legs, an increased susceptibility to tubercular infection and other difficulties. For all this he receives the difference between the amount of the verdict and the proved loss of earning capacity. While the amount awarded may, apart from the circumstances, seem to have been generous, we do not feel authorized to say that it is so excessive as to evince passion and prejudice or to warrant any action by this court.

The judgment and order appealed from are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied July 7, 1913.

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CULLEN, RESPONDENT, v. WESTERN MORTGAGE & WARRANTY TITLE CO., APPELLANT.

(No. 3,257.)

(Submitted May 20, 1913. Decided June 14, 1913.)

[134 Pac. 302.]

*Real Property—Tax Deeds—Conclusiveness—Statutes—Construction—Application for Deed—Defective Affidavit—Limitations—Pleading—Amendment During Trial—Discretion.*

**Real Property—Tax Sales—Mistakes in Assessment—Effect on Deed.**

1. Under the rule that when land is sold as the property of a particular person for taxes which have been correctly imposed upon it, no misnomer or other mistake relating to the ownership thereof affects the sale or renders it void or voidable, a tax deed which recited that the property in question was sold for taxes upon an assessment to "American Mining Co. et al." was not void, the mistake of the assessor in not assessing to all the owners, if known to or readily ascertainable by him, having been in the nature of an irregularity or informality only.

**Same—Tax Deeds—Failure to Recite Year of Assessment—Effect.**

2. Where from recitals in a tax deed the year of the assessment was made apparent indirectly, the fact that it contained no direct statement imparting such information did not render the deed void.

**Same—Sale Void, Where.**

3. A sale of all the real property on which taxes were delinquent, at one time for a lump sum to the county, though belonging to various owners, was void, and therefore did not constitute a bar to a resale for delinquency the succeeding year.

**Same—Tax Deeds—Conclusiveness—Statutes—Construction.**

4. The clause of section 2654, Revised Codes, as amended (Laws 1909, Ch. 50), making a tax deed conclusive evidence of all proceedings leading up to its execution, refers to acts and proceedings required at the hands of the officers charged with duties in relation to assessment and taxation, and not to something necessary to be done by the applicant for the deed.

**Same—Tax Sales—Application for Deed—Defective Affidavit.**

5. *Held*, that the affidavit filed by an applicant for a tax deed which showed a service of the notice of application by posting only, without any service upon any of the owners, and failed to aver that the premises were unoccupied so as to authorize posting (Pol. Code 1895, secs. 3895, 3896; Rev. Codes, secs. 2651, 2652), was jurisdictionally defective, and that a deed issued notwithstanding such defects in the affidavit—the basis of action by the treasurer in the premises—was void.

**Same—Tax Deeds—Setting Aside—Statutes—Limitations—Pleading.**

6. Section 2654 as amended (Laws 1909, ch. 50), providing that any right of action to set aside a tax deed issued theretofore shall be barred unless suit be commenced within two years from the passage of the Act, being a statute of limitation, must be pleaded in the answer by one seeking to take advantage of it.

**Same—Tax Deeds—Setting Aside—Applicability of Statute—Actions—Technicalities.**

7. Where the sole aim of an action is to do away with a tax deed as a claim of title adverse to the plaintiff, it is an action "to set aside or annul" a tax deed so as to make the provision of section 2654, *supra*, applicable, even though it may be termed one to quiet title.

**Trial—Pleadings—Amendments—Discretion.**

8. After issue joined, the matter of permitting amendments to pleadings is one addressed to the sound judicial discretion of the trial court, and before the supreme court will hold a refusal of leave to amend to have been error, appellant must show an abuse of such discretion.

**Same.**

9. Where appellant had made no showing whatever in support of his application for leave to amend his answer and offered no excuse for delay in making it for about four months and a half after filing it and until the cause was before the court for argument, the court may not be said to have abused its discretion in refusing the leave.

*Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.*

**ACTION** by Matthew Cullen against the Western Mortgage & Warranty Title Company. Defendant appeals from the judgment and from an order denying it a new trial. **Affirmed.**

*Mr. Massena Bullard*, and *Mr. Leslie B. Sulgrove*, for Appellant, submitted a brief; *Mr. Henry C. Smith*, of counsel, argued the cause orally.

The certificate of tax sale to Silver Bow county should not have been admitted in evidence. The attempted tax sale to that county was void. The county treasurer sought to sell to it at one time and in lump all the property upon which taxes for the time recited in the tax certificate had not been paid. The amount of the sale is \$11,527.02, while the tax due upon the property embraced in this action amounted to less than eight dollars. The treasurer was without any authority whatever to make a sale of that kind. It was his duty to proceed with the sale of property in alphabetical and numerical order and to make a certificate for each sale made by him. (Rev. Codes, secs. 2636, 2638.)

It appears from the certificate of tax sale that Silver Bow county bought the property "because it was 'the person' who would take the least quantity of land sufficient to pay the taxes, penalty and costs due, including fifty cents to the treasurer, for the duplicate certificate of sale." A county cannot become a competitive bidder at a tax sale and cannot be charged with fifty cents for the duplicate certificate of sale. (*Rush v. Lewis & Clark County*, 36 Mont. 570, 93 Pac. 943.)

Was the tax deed under which the appellant claims title to the entire property in controversy "conclusive evidence of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed"? One of the grounds of objection interposed by respondents in the court below to the admission of the tax deed was that the deed was "void and of no effect, because it appears that the certificate of tax sale upon which same is based is defective and void, in that it does not state a description of the land sold, nor the amount paid therefor, nor the name of the person assessed, as the same appeared upon the assessment-roll." The land is described as "Narragansett Lode No. 1836." This is a sufficient description. The court takes judicial notice of the system of surveys prevailing in

the state. (*Bank of Lemoore v. Fulgham*, 151 Cal. 231, 90 Pac. 936.) The certificate shows that the amount paid by the purchaser at the tax sale was \$2.64. The name of the person assessed is given in the certificate of sale as "American Ming. Co.," which is clearly an abbreviation of American Mining Company, against whom the agreed statement concedes the assessment was duly and regularly made. The expression "et al.," following the name of the American Mining Company in the stipulation, does not constitute a name and it was not necessary that it should be repeated in the certificate of sale.

The conclusive evidence clause of section 2654, Revised Codes, is a part of the law under which the proceeding was carried on, and its effect is the same as if it declared that, although all of the intermediate steps are directed in section 2653, yet, if they are not performed as required, and the owner permits the matter to proceed until the deed is issued, he shall be thenceforth precluded from proof of such nonobservance, and the requirements shall be conclusively presumed to have been complied with, except those which are necessary to comply with constitutional mandates, and the legislature may make the deed conclusive as to matters or things which, in the first instance, the legislature might not have required to be done, and which were in their nature, therefore, nonessentials. (*Chase v. Trout*, 146 Cal. 350, 80 Pac. 81; *Bank of Lemoore v. Fulgham*, 151 Cal. 234, 90 Pac. 936; *Phillips v. Cox*, 7 Cal. App. 308, 94 Pac. 377.) Is assault upon the title barred by the statute of limitation? Chapter 50, Laws of 1909, was approved March 3, 1909, and this case was not commenced until November 4, 1911, more than two years and eight months after the enactment of the statute. The plaintiff is by its provisions barred from assailing the validity of the tax deed to Davenport. It is conclusive of all its recitals and must now be held to have conveyed a good title to the purchaser and to have divested all former owners of any title that they might have had. (*Ross v. Royal*, 77 Ark. 324, 91 S. W. 178; *Turner v. New York*, 168 U. S. 90, 42 L. Ed. 392, 18 Sup. Ct. Rep. 38; *Saranac Land etc. v. Roberts*, 177 U. S. 318, 44 L. Ed. 786, 20 Sup. Ct. Rep. 642.)

*Messrs. Nolan & Donovan*, for Respondent, submitted a brief; *Mr. Louis P. Donovan* argued the cause orally.

We may preface our argument in this case with the remark that the property here involved is worth approximately \$75,000. The appellant herein is asserting title to this property upon a tax deed, the consideration for which was \$2.64. It is this shocking inadequacy of price which has led courts generally, and this court in particular, to declare the rule of construction in such cases to be as follows: "The tax deed must be construed most strongly against him who claims under it, and where one of two constructions will support the claim of the citizen, the deed must be held invalid." (*Rush v. Lewis & Clark Co.*, 36 Mont. 566, 570, 93 Pac. 943.)

From the recital in the deed, it appears that Davenport paid for the property in question \$2.64 on the 27th day of January, 1899. The notice is dated the 26th day of December, 1901, one day less than thirty-five months after the sale. "The amount then due" would therefore be the sum of \$2.64 and one per cent per month for approximately thirty-five months. (Revised Codes, sec. 2644.) This amounts to \$3.564, which is \$0.026 less than the amount stated in the notice. In ordinary cases an error of two or three cents would be ignored under the rule "*De minimis non curat lex*," but that rule has no application to a statute requiring the notice of application for tax deed to state the amount then due. (*Shine v. Olsen*, 110 Minn. 44, 19 Ann. Cas. 962, and note, 24 N. W. 452; *Shinkle v. Meek*, 69 Kan. 368, 77 Pac. 837; *Salter v. Corbett*, 80 Kan. 327, 102 Pac. 452; *Casner v. Gahlman*, 6 Kan. App. 295, 51 Pac. 56, 60 Kan. 857, 56 Pac. 1131; *Reed v. Lyon*, 96 Cal. 501, 31 Pac. 619; *Black on Tax Titles*, sec. 336; *Canty v. Staley*, 162 Cal. 379, 123 Pac. 252; *Simmons v. McCarthy*, 118 Cal. 622, 50 Pac. 761.) The notice is also defective in that it is addressed to a total stranger to the title. "As a general rule, the redemption notice must be addressed to the person upon whom it is served. \* \* \* Any substantial mistake in the name of the owner of such a character as to be misleading will vitiate the notice."

(Black on Tax Titles, sec. 333; *Steele v. Murray*, 80 Iowa, 336, 45 N. W. 1030.) Where the notice is fatally defective, the deed is a nullity. (*Hughes v. Cannedy*, 92 Cal. 382, 28 Pac. 575; *Reed v. Lyon*, 96 Cal. 501, 31 Pac. 619.) If a deed be issued by the treasurer without proof on file in his office that notice has been given as required by the statute, the deed is an absolute nullity. The officer having acted without authority, his act is without effect, and does not prove anything or affect any rights whatsoever. (*Miller v. Miller*, 96 Cal. 376, 31 Am. St. Rep. 229, 31 Pac. 247; *Reed v. Lyon*, 96 Cal. 501, 31 Pac. 619; *Johnson v. Taylor*, 150 Cal. 201, 119 Am. St. Rep. 181, 10 L. R. A. (n. s.) 118, 88 Pac. 903; *Johnson v. Canty*, 162 Cal. 391, 123 Pac. 263; *Wetherbee v. Johnston*, 10 Cal. App. 264, 101 Pac. 802.)

The deed is void upon its face. It appears upon the face of the deed that the property was assessed to the "American Mining Co. et al." Such an assessment is void upon its face and leaves the deed also void upon its face. (*Daly v. Ah Goon*, 64 Cal. 512, 2 Pac. 401; *De Frieze v. Quint*, 94 Cal. 653, 28 Am. St. Rep. 151, 30 Pac. 1; *Pearson v. Creed*, 78 Cal. 144, 20 Pac. 302; *Hughes v. McClellan*, 80 Cal. 393, 22 Pac. 287.)

The allowance of, or refusal to allow, an amendment to the pleadings is a matter peculiarly within the discretion of the trial court, and this discretion will not be reviewed upon appeal unless a clear abuse thereof is shown. (3 Cyc. 327, and cases cited.) It has been uniformly held that a refusal to allow an amendment setting up the statute of limitations at the close of the case is not an abuse of discretion. (*Baxter v. Hamilton*, 20 Mont. 327, 51 Pac. 265; 25 Cyc. 1412, and cases cited; see, also, *Neimick v. American Ins. Co.*, 16 Mont. 318, 40 Pac. 597; 31 Cyc. 401, 404.)

The statute of limitations will not run in favor of a tax deed which is void upon its face, and under which possession has not been taken and maintained for the statutory period of prescription. (37 Cyc. 1507.) There must be actual possession by the purchaser before the statute begins to run; and limitation of time in which one can bring an action or suit

contesting such a title cannot operate to cut off the owner's title where the tax proceeding is void, except by way of prescription which depends upon the actual possession under the tax deed. A deed upon a void sale cannot draw to it the constructive possession of unoccupied land. (Blackwell on Tax Title, secs. 944, 895; *Martin v. White*, 53 Or. 319, 100 Pac. 290.) The case of *Martin v. White*, above cited, contains an exhaustive review of the authorities upon this particular question, and is very closely reasoned. To the same effect see the extended notes under *Nind v. Myers*, 8 L. R. A. (n. s.) 157; *Mathews v. Blake*, 27 L. R. A. (n. s.) 347.

*Mr. L. J. Hamilton* presented a brief in behalf of defendant Mattie F. Curtis and intervener John H. Johns, and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

On November 4, 1911, the respondent, Matthew Cullen, brought this action as plaintiff against the American Mining Company, Ltd., H. H. Stackpole, Carl Kleinschmidt, Albert Kleinschmidt, George F. Hale, Alfred W. Hale, Mattie F. Curtis, John G. Brown, Reinhold H. Kleinschmidt, Western Mortgage & Warranty Title Company, and Anna Davenport, to quiet the title of respondent to an undivided 4/15 interest in what is called the Narragansett Lode. The complaint is in the simple form alleging ownership of such interest in the plaintiff; that the defendants named claim some estate or interest adverse to him, and that the claims of defendants are without right.

The defendants American Mining Company, Ltd., H. H. Stackpole, Carl Kleinschmidt, George F. Hale, Alfred W. Hale and Anna Davenport defaulted. Separate answers to the complaint were filed as follows: By the Western Mortgage & Warranty Title Company, denying that plaintiff has any interest in the property, alleging ownership of the whole of said property and that the Western Mortgage & Warranty Title Company and its predecessors in interest had been in the quiet

and peaceable possession thereof since January 20, 1902, asserting that plaintiff and the other defendants named claim, but without right, some interest in the property, and praying that the title of the Western Mortgage & Warranty Title Company in the same be quieted; by Mattie F. Curtis, disclaiming any knowledge of plaintiff's claim and asserting an undivided  $1/48$  interest in the property; by John G. Brown, disclaiming any interest in the property, and alleging that he had conveyed all his interest to the Western Mortgage & Warranty Title Company; by Reinhold H. Kleinschmidt, disclaiming any interest in the property, and alleging that he had conveyed all his interest to the Western Mortgage & Warranty Title Company; by Frank H. Cooney, substituted in place of George F. Hale, admitting plaintiff's interest as asserted, denying any claim thereto, denying that the Western Mortgage & Warranty Title Company is the owner of the property or has any interest therein, save an undivided  $1/48$  interest, and alleging an undivided  $3/20$  interest by conveyance from George F. Hale. The plaintiff replied to the answer of the Western Mortgage & Warranty Title Company, denying its claim, and also replied to the answer of Mattie F. Curtis, disclaiming any knowledge as to hers. On July 8, 1912, Lucina S. Wadsworth filed her complaint in intervention, asserting ownership to an undivided  $2/15$  interest by virtue of the last will and testament of Samuel H. Stuart, deceased, admitting the asserted claims of plaintiff Cullen, of defendant Curtis and of defendant Cooney, and also that John H. Johns owns a  $1/24$  interest, the American Mining Company an  $11/30$  interest, and the Western Mortgage & Warranty Title Company a  $1/48$  interest, and denying that the Western Mortgage & Warranty Title Company is the owner of the property or of any interest therein greater than a  $1/48$ . On July 10, John H. Johns filed his complaint in intervention, asserting ownership of a  $1/24$  interest in the property, admitting the asserted claims of plaintiff Cullen, of defendant Curtis and of defendant Cooney, and also that the American Mining Company owns an  $11/30$  interest and the Western Mortgage & Warranty Title Company a  $1/48$  interest, but denying that the



Western Mortgage & Warranty Title Company is the owner of the property or has any interest therein greater than a 1/48.

On July 12, 1912, the above-named parties entered into a stipulation to submit the cause to the court upon the following agreed facts: That in 1892 the title to the property in question stood of record and was in fact vested in Alfred W. Hale (an undivided 7/60), George F. Hale (an undivided 7/60), Matthew Cullen (an undivided 4/15), Samuel H. Stuart (an undivided 2/15), and the American Mining Company, Ltd. (an undivided 11/30); that save as affected by the tax deed hereinafter referred to, the title so remains, except that in or since 1905 the above interests of Alfred W. Hale and George F. Hale became vested in John H. Johns (an undivided 1/24), Mattie F. Curtis (an undivided 1/48), Western Mortgage & Warranty Title Company (an undivided 1/48), and Frank H. Cooney (an undivided 3/20), and that the above interest of Samuel H. Stuart became vested in Lucina S. Wadsworth as his executrix and devisee; that in 1897 the property was assessed to Samuel H. Stuart and S. H. Stackpole for back taxes for 1891, 1892, 1893 and 1894, and such not having been paid, the property was on February 12, 1898, after due and regular notice, offered for sale and a certificate of sale was issued to Silver Bow county for all property offered for sale on February 12, 1898, a list of which, attached to the certificate, included the property in question; that said property was redeemed from said sale on August 9, 1911, by Reinhold H. Kleinschmidt and whatever interest he thus acquired was before the commencement of this action conveyed to the Western Mortgage & Warranty Title Company; that in 1898 the property was assessed to "American Mining Company et al.," taxes were levied and became delinquent, and on January 27, 1899, after due and regular notice, it was offered for sale and a certificate of its sale was issued to Lee Davenport; that on January 5, 1902, Lee Davenport filed with the treasurer his affidavit and notice of application for tax deed, and on January 28, 1902, a tax deed to said property was by the treasurer issued and delivered to said Davenport; that whatever interest said Davenport acquired by virtue of said deed has be-

come vested in the Western Mortgage & Warranty Title Company.

It does not specifically appear when the agreed statement of facts was filed; but on July 23, 1912, Mattie F. Curtis and John H. Johns filed their separate replies to the answer of the Western Mortgage & Warranty Title Company, in effect denying the claim of ownership asserted by it; whereupon the following proceedings were had in court: "This cause coming on this day regularly on argument upon the agreed statement of facts heretofore filed herein, the parties being represented by their respective counsel, \* \* \* it was stipulated and agreed \* \* \* that the answer of the Western Mortgage & Warranty Title Company on file herein should stand as the answer to the complaint in intervention of John H. Johns and to the separate answer of Mattie F. Curtis, and that the replies of John H. Johns and Mattie F. Curtis filed and entered herein on this day should be deemed replies to the said answer of the Western Mortgage & Warranty Title Company; thereupon Massena Bullard, counsel for the Western Mortgage & Warranty Title Company, moved the court for leave to file an amendment to the separate answer of said Western Mortgage & Warranty Title Company, setting up a third affirmative defense which said proposed amendment is in the words and figures as follows, to wit: 'Third: For a third defense: That the plaintiff's cause of action is barred by the provisions of section 2654 of the Revised Codes of Montana of 1907, as amended by Chapter 50 of the Laws of the Eleventh Session of the Legislative Assembly of the State of Montana.' To the granting of which amendment \* \* \* counsel for adverse parties objected, \* \* \* which objection \* \* \* was by the court sustained, and an exception to the ruling of the court noted on the part of the Western Mortgage & Warranty Title Company. Thereupon the case was fully argued by counsel for the respective parties and submitted to the court for consideration and decision and the case was by the court taken under advisement." On September 9, 1912, the action was dismissed as to the defendant Carl Kleinschmidt; testimony was taken as to the defendants who had defaulted,

and a general finding was made by the court in favor of plaintiff Cullen, the interveners Wadsworth and Johns, and the defendants Curtis and Cooney, and against the defendant Western Mortgage & Warranty Title Company. The judgment which was filed on September 10, 1912, decrees that the interests in the property are as follows: To plaintiff Cullen, 4/15; to intervener Johns, 1/24; to intervener Wadsworth, 2/15; to defendant Curtis, 1/48; to defendant Cooney, 3/20; and to defendant Western Mortgage & Warranty Title Company, 1/48. The costs of plaintiff, the interveners and the prevailing defendants are taxed against the Western Mortgage & Warranty Title Company, and it is decreed to be barred from asserting any claim to the property over and above an undivided 1/48 interest. From this judgment and from an order denying its motion for a new trial, the Western Mortgage & Warranty Title Company has prosecuted these appeals.

The principal question involved is the construction and application of section 2654, Revised Codes, as amended by Chapter 50, Session Laws of 1909. Section 2653, Revised Codes, provides that the matters recited in the certificate of sale must be recited in the tax deed and that such deed, when duly acknowledged or approved, is *prima facie* evidence of certain things. Section 2654 as amended, provides that such deed, except as against actual fraud, is conclusive evidence of all other proceedings from the assessment by the assessor to the execution of the deed, "and no action can be maintained to set aside or annul a tax deed, upon any ground whatever, unless the action is commenced within two years from and after the date of issuance of such tax deed; provided, that any existing right of action to set aside or annul any tax deed, heretofore issued, shall be barred unless instituted within two years from and after the passage of this Act." (Sess. Laws 1909, p. 58.) It is argued by the respondent: (1) That the deed is void upon its face and therefore the above statute has no application; (2) that the sale to Davenport was void because at the time thereof, the property stood unredeemed from a previous sale to Silver Bow county; and (3) that the deed is void for want of jurisdiction in the treas-

urer to issue it because of fatal defects in the affidavit of the purchaser. The appellant, contending that the deed is valid on its face, insists that error was committed in the admission and consideration of the certificate of sale to Silver Bow county (Exhibit "A") and the affidavit and notice of Lee Davenport for the tax deed (Exhibits "C" and "D), on the ground that under the section above quoted the deed was conclusive as to every matter to which these exhibits could be relevant. Error is also assigned upon the refusal of the trial court to allow the amendment to the appellant's answer wherein it was sought to plead section 2654 as a limitation.

1. The deed recites that the property was sold for taxes [1] upon an assessment to "American Mining Co. et al." It is urged that this implies some knowledge or understanding upon the part of the assessor that others than the American Mining Company were owners and that since our statute requires that property subject to taxation be assessed to the owner, if known, or if not known, to "unknown owners," the assessment is void, and if the deed shows such an assessment it is void upon its face. Were the question an open one in this state, the weight of authority might compel a recognition of the fact that the duty of the assessor was to assess to all the owners where they were known to or could readily have been ascertained by him, and that such an assessment as the one in question is without validity. (*McWilliams v. Gulf States L. & T. Co.*, 111 La. 194, 35 South. 514; *Norres v. Hays*, 44 La. Ann. 907, 11 South. 462; *Asper v. Moon*, 24 Utah, 241, 67 Pac. 409; *Clark v. Bragdon*, 37 N. H. 562; *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254; *De Frieze v. Quint*, 94 Cal. 653, 28 Am. St. Rep. 151, 30 Pac. 1; *Greenwood v. Adams*, 80 Cal. 74, 21 Pac. 1134; *Pearson v. Creed*, 78 Cal. 144, 20 Pac. 302; *Daly v. Ah Goon*, 64 Cal. 512, 2 Pac. 401.) But the question is settled otherwise in this state by the provisions of section 2672, Revised Codes, and by the construction thereof as twice announced by this court, to the effect that when land is sold as the property of a particular person for taxes which have been correctly imposed upon the land, no misnomer or other

mistake relating to the ownership thereof affects the sale or renders it void, or voidable (*Cobban v. Hinds*, 23 Mont. 338, 349, 59 Pac. 1; *Birney v. Warren*, 28 Mont. 64, 72 Pac. 293), such mistake being in the nature of an irregularity or informality only. (*Cobban v. Hinds*, *supra*.)

We cannot seriously consider the proposition that the tax [2] deed is void because it does not state the year in which the assessment was made. Section 2653 required the deed to recite the matters that must be recited in the certificate of sale; and section 2641 requires the certificate to recite, among other things, the year of the assessment. The deed recites that the property in question "was subject to taxation for the year 1898," and that it was duly assessed "for said year"; that the assessment for "said year" was duly equalized and the sum of \$1.49 taxes was duly levied against it "for said year." When it is remembered that the rule in this state is to assess in the year for which the taxes are payable, and that the assessment, equalization and levy all occur in the same year, it would be a refinement to say that the deed is silent as to the year of the assessment or the year in which the assessment was made. No set form of words is prescribed for the recital, and while the deed may not be perfect in phrase in this regard, it is not in the same condition as that condemned by the California supreme court in *Simmons v. McCarthy*, 118 Cal. 622, 50 Pac. 761. Protection to the delinquent owner against the taking of his property without due process of law does not go to the length of requiring that tax proceedings "be criticised with microscopic nicety," or that tax deeds shall be rejected for every insignificant departure from verbal precision. (*Casey v. Wright*, 14 Mont. 315, 36 Pac. 191.)

2. Concerning Exhibit "A," the theory of respondent is that the property having been sold in 1898 to the county for delinquent taxes, it could not again be sold or exposed for sale until the period of redemption had expired, and therefore the sale in 1899 to Lee Davenport was void. Whether or not this exhibit was inadmissible in consequence of section 2654, we agree with the appellant that it should have been excluded on other

grounds. It shows upon its face that all the real property in [3] Silver Bow county the taxes upon which were then delinquent, though belonging to various owners, was sold at one time for a lump sum to Silver Bow county, "he being the person who would take the least quantity sufficient to pay the taxes, penalty," etc. Such a sale has no validity (*Casey v. Wright, supra; Rush v. Lewis & Clark County*, 36 Mont. 566, 93 Pac. 943), and could not constitute any obstacle to the proceedings of the following years. For reasons, however, which will presently appear, we do not deem the error in admitting this exhibit as of any consequence.

3. Since the deed was not invalid on its face, the question that next arises is whether Exhibits "C" and "D" were prop- [4] erly admitted; in other words: Does the conclusive evidence clause of section 2654 preclude inquiry into the sufficiency of such proceedings as Davenport was required to take? This particular provision of section 2654 appears also as section 3898 of the Political Code of 1895, which was in force at the time the deed was applied for and given. At the same time and in the same chapter it was provided that no deed of property sold for delinquent taxes must be issued by the treasurer "until after the purchaser shall have filed" with the treasurer an affidavit showing that there had been served upon the owner of the property, or upon the occupant of it if it was occupied "a written notice stating that said property or a portion thereof, has been sold for delinquent taxes; giving the date of sale, the amount of property sold, the amount for which it was sold, the amount then due, and the time when the right of redemption will expire, or when the purchaser will apply for a deed." (Secs. 3896 and 3895, Pol. Code of 1895.) Section 3895 also provided: "In case of an unoccupied property, a similar notice must be posted in a conspicuous place upon the property," etc. Excellent reasons exist for the belief that these sections (secs. 3895, 3896, Pol. Code of 1895) were adopted from California; at all events, they are identical in substance with sections 3785 and 3787 of the California Political Code, and these, before the enactment of our Code of 1895, had been construed and applied

in several decisions of the supreme court of that state. If the construction given by the California court to the California sections is not in truth an integral part of our sections, it at least commends itself in principle, and the effect of these California decisions is that the conclusive evidence provision refers, and was intended to refer, to acts and proceedings required to be done and had at the hands of public officials intrusted with the various steps leading up to the execution of a tax deed, and not to something required to be done by the applicant for the deed. (*Miller v. Miller*, 96 Cal. 376, 31 Am. St. Rep. 229, 31 Pac. 247; *Reed v. Lyon*, 96 Cal. 501, 31 Pac. 619.) The deed is not even *prima facie* evidence that the statutory notice was given. (*Johnson v. Canty*, 162 Cal. 391, 123 Pac. 263.) The question then remains whether the affidavit and notice were so [5] infirm as to affect the deed. The affidavit recites that Lee Davenport "on the 26th day of November, 1901, served by posting in a conspicuous place on said property, a written notice \* \* \* of which a true copy is herewith attached." The true copy attached to the affidavit bears date December 26, 1901. It is addressed "To American Mining Co. et al." The only designation of the property is the simple word "Naragansett," and the amount "now due" is given as \$3.59. Passing by such other questions as may be suggested by the disparity of dates and the paucity of detail in the notice, we think the affidavit was jurisdictionally defective because it shows service of notice by posting only, without any service upon the American Mining Company, one of the known owners, or upon any of the owners included in the designation "*et al.*," and without any averment that the premises were unoccupied so as to authorize posting. Provisions such as appear in sections 3895 and 3896, Political Code of 1895, are a limitation upon the power of the treasurer to issue the tax deed, and render void any deed issued by him without requiring a compliance with them. The affidavit in particular is the basis upon which the treasurer is to act, and the conditions from which his power to issue the deed arises must appear by the affidavit. "If the affidavit shows that the notice was served upon any person other than

the one to whom the property was assessed, it must also show that the person so served was one upon whom the purchaser was authorized to serve the notice. If the service is not made upon the owner, it must be posted upon the property, if it is unoccupied; or, if it is occupied, it must be served upon the person occupying it. It is incumbent, then, upon the purchaser to show by his affidavit whether the property was occupied or unoccupied, and if occupied, that the person upon whom the notice was served was at the time occupying it." (*Simmons v. McCarthy, supra; Hall v. Capps*, 107 Cal. 513, 40 Pac. 809.)

4. It is contended that unless section 2654, Revised Codes, [6] as amended, is a statute of inhibition or repose, and therefore applicable without plea, the amendment should have been allowed. A careful consideration of this statute fails to disclose that as to tax deeds before its passage, any question of public policy is involved, other than as such question is involved in all statutes of mere limitation; and instead of conferring a right where none existed before, the statute by its very language assumes an existing right, takes a remedy theretofore available as against an invalid tax deed issued before its passage, and changes the time within which that remedy may be invoked. A comparison of this situation with that disclosed in *Franklin v. Franklin*, 40 Mont. 348, 20 Ann. Cas. 339, 26 L. R. A. (n. s.) 490, 106 Pac. 353, or with that disclosed in *Dolenty v. Broadwater County*, 45 Mont. 261, 122 Pac. 919, will emphasize the distinction between such a provision as the one now before us and one in which time is part of the right of action. *Way v. Hooton*, 156 Pa. 8, 26 Atl. 784, contains some language in support of the conclusion that the statute in question is, as to tax deeds issued after its passage, a statute of repose, but that question is not before us. The argument assumes that the respondent had a right of action to annul or set aside appellant's tax deed at the time the statute was enacted, and if, as we hold, the statute is one of limitation so far as such rights are concerned, it follows that advantage of it must be taken by plea in the answer.



The record does not disclose what objections were made nor why the trial court declined to permit the amendment. Respondent makes the suggestion that the statute applies only to actions "to set aside or annul a tax deed"; that this is not such an action but one to quiet title merely; hence the statute does not apply. In other words, a plaintiff seeking in fact to destroy the effect of a tax deed must confront the statute if he assail the tax deed as such, but, designing to accomplish precisely the same thing, he may avoid the statute by calling his action one to quiet title, declaring upon his ownership generally and demanding that his adversary appear and plead the tax deed. This is surely a subordination of substance to form; a thing is not changed by changing its name; where the sole object of an action is to get rid of a tax deed as a claim of title adverse to the plaintiff, we see no reason why it is not as much an action to annul or set aside such deed as though expressly so designated. In support of respondent's position, 37 Cyc., pp. 1500 and 1501, is cited; but the decisions there collated seem rather to militate against the position taken. As we read them, the cases of *Kipp v. Johnson*, 31 Minn. 360, 17 N. W. 957, *Flickinger v. Cornwell*, 22 S. D. 382, 117 N. W. 1039, *Smith v. Sherry*, 54 Wis. 114, 11 N. W. 465, seem to support the view that this action as it finally exhibits itself in the agreed statement of facts is subject to the limitational provisions of the statute in question.

But we cannot hold that reversible error occurred in refusing the leave to amend. While it is the policy of our law to permit amendments to pleadings in order that litigants may have their causes submitted upon every meritorious consideration that may be open to them (Rev. Codes, secs. 6588, 6589), and while it is the rule to allow, and the exception to deny, amendments (*Leggat v. Palmer*, 39 Mont. 302, 102 Pac. 327; *Flaherty v. Butte Electric Ry. Co.*, 43 Mont. 141, 115 Pac. 40), yet they [8] are not at all stages of the proceedings a matter of right. After issue joined, the matter lies within the sound judicial discretion of the trial court, and an abuse of that discretion must

be made to appear before this court can say that a refusal of leave to amend was wrong. No showing whatever was made [9] by the appellant in support of his application; no explanation or excuse was offered for the delay in making the same. As we recall the oral argument, counsel for appellant stated that he had considered the necessity of pleading the statute and had deliberately chosen not to do so. At the time the application was made the appellant's answer had been on file for something like four months and a half; the cause was before the court for argument; the parties had all agreed, some eleven days before, upon the facts which should be the basis of decision, and it is possible that had the amendment been allowed, further pleadings and additional delay might have been required. The statute of limitations, it is true, is an entirely legitimate defense, and no refusal of leave to amend could be justified solely because the amendment offered was the statute of limitations; but in view of the circumstances above mentioned, we do not feel warranted in saying that the court clearly abused its discretion in refusing the leave.

Such other questions as are discussed in the briefs of counsel are merely incidental. What has been written above disposes of the essentials of these appeals and requires that the judgment and order overruling the motion for new trial be affirmed. Ordered accordingly.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied September 20, 1913.

STATE EX REL. JACOBSON, RELATOR, v. BOARD OF  
COUNTY COMMISSIONERS, RESPONDENT.

(No. 3,339.)

(Submitted June 9, 1913. Decided June 19, 1913.)

[134 Pac. 291.]

*New Counties—County Commissioners—Jurisdiction—Powers—  
Statutes—Amendments—Effect on Pending Proceedings—  
Certiorari.*

**New Counties—County Commissioners—Excess of Jurisdiction—Certiorari.**

1, 2. *Certiorari* lies to review the actions of boards of county commissioners taken with reference to the creation of new counties, they being required, in such proceedings, to act as quasi-judicial tribunals within the meaning of section 7203, Revised Codes, which provides that the writ may go when a board exercising judicial functions has exceeded its jurisdiction and there is no appeal or any plain, speedy and adequate remedy.

**Same—Exclusion and Inclusion of Territory—County Commissioners—Limit of Power.**

3, 4. Chapter 112, Laws of 1911, did not, and Chapter 133, Laws of 1913, amendatory of the former Act, does not empower a board of county commissioners to incorporate territory within the boundaries of a proposed new county which is not included in the petition praying for its creation, or to exclude territory unless a proper petition for withdrawal thereof is presented.

**Amendatory Statutes—Effect on Pending Proceedings.**

5. If an amendatory Act changes the very basis of a right or affects the jurisdiction, and provision is not made for a saving clause, proceedings initiated under the old law may not be completed under the new.

**New Counties—Statutes—Effect of Amendments on Pending Proceedings—Case at Bar.**

6. Proceedings for the creation of a new county were instituted under Chapter 112, Laws of 1911, and petitions containing the necessary recitals presented to the proper board of county commissioners. One of the essentials to favorable action by the board under Chapter 112 was that the county proposed to be created had property of the assessed valuation of \$4,000,000. Proclamation calling for an election was not made until after Chapter 112 had been amended by Laws of 1913 (Chapter 133, p. 484). Chapter 133 amended the original Act (Chapter 112) by authorizing the creation of a new county if it possessed assessable property to the amount of \$3,000,000—thus changing the very basis of the proceedings and the jurisdiction of the board. *Held*, on *certiorari*, under the rule declared in paragraph 5 above, that in assuming to complete the proceedings under the Act of 1913, the board's action was without jurisdiction and void.

Original application for writ of *certiorari* to review the actions of the board of county commissioners of Teton county looking to the creation of Toole county. Writ issued.

*Messrs. Norris & Hurd*, and *Mr. John W. Coburn*, for Relator; *Mr. Edwin L. Norris* and *Mr. George E. Hurd* argued the cause orally.

*Messrs. Walsh, Nolan & Scallon*, for Respondent, submitted a brief; *Mr. C. B. Nolan* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

*Certiorari* to review the action of the board of county commissioners of Teton county. This proceeding was instituted by Henry Jacobson, a taxpayer and qualified elector within that portion of Teton county which was sought to be organized into a new county to be known as Toole county. On May 22, 1912, certain residents of the western portion of Hill county and the northern portion of Teton county presented to the county commissioners of Teton county petitions, in due form and subscribed by the requisite number of qualified electors, praying for the creation of a new county to be called Toole county, to comprise twenty-nine townships in the western portion of Hill county and substantially all of the northern half of Teton county, excepting about seven townships—the lines being drawn so as to exclude the town of Cut Bank from the proposed county. The petition recites that the assessed valuation of the property within the proposed new county is \$4,122,357. Notice was thereupon given for a hearing for June 21. Adjournments were taken from day to day to July 5, on which last-named date a final hearing was had; twelve requests for withdrawals were denied, the prayer of the petitions granted, the proper resolution adopted, and the board determined the boundaries of the proposed new county as described in the petitions; that the petitions contained the requisite number of genuine signatures; that no lines of the proposed new county would pass within eighteen miles of the county seat of Hill county or the county seat of Teton county; that within the boundaries of the proposed new county was property of the assessed valuation of more than four million dollars as shown by the last as-

assessment; that the formation of the proposed new county would not reduce the assessed valuation of either Hill county or Teton county to less than five million dollars or the area of either to an amount less than 800 square miles of surveyed lands; that the proposed new county should be a county of the seventh class and its name should be Toole. The board thereupon adjourned to July 15, on which date the proposed new county was divided into suitable road districts, school districts and election precincts; the proper election officers were appointed; an election called for October 15, 1912, and due proclamation thereof made and published. In this proclamation the territory in which the election was to be held was described the same as in the original petitions and in the resolution adopted on July 5. The board thereupon adjourned *sine die*. On March 26, 1913, the board being in session, an attorney representing certain petitioners moved the board "to take up the petition for the creation of Toole county and to proceed to finally determine the same." At the same time there was presented, considered and allowed "a pretended petition for the withdrawal of territory from the proposed Toole county." On that day the board adopted a resolution granting the prayer of the petitions filed May 22, 1912, for the creation of the proposed new county to be known as Toole county; defined its boundaries; determined that the petitions contained the necessary number of genuine signatures; that no lines of the proposed new county would pass within eighteen miles of the county seat of Hill county or the county seat of Teton county; that the territory sought to be included within the new county contained property, according to the last assessment, of at least *three million dollars*; that the formation of the new county would not reduce the assessed valuation of property in either Teton county or Hill county to a sum less than five million dollars or the area of either of those counties to an amount less than 800 square miles of surveyed land; that the proposed new county would be a county of the seventh class and be known as Toole county. The board further divided the proposed new county into road districts, school districts

and election precincts; appointed election officers and entered an order "that the election for the purpose of creating said county and organizing the same as required by law, be postponed until the 25th day of June, 1913." On March 27, a proclamation was issued calling an election for June 25, 1913, within the territory described in the resolution of the day previous, and publication thereof was ordered. On May 21 this proceeding was instituted. The petition sets forth the foregoing facts somewhat more in detail, and then alleges that an election was not held on October 15, 1912, as ordered; "that said pretended petition for withdrawal of territory from said proposed Toole county was not signed by any petitioners and in no respect conformed to or complied with the provisions of law relating to petitions for the withdrawal of territory from a proposed new county and no other withdrawal petitions, except those hereinbefore referred to and which were denied on or previous to July 5th, 1912, were presented to or considered by said board." It is further alleged that the resolution adopted on March 26, defining the boundaries of the proposed new county, included within the boundaries of such proposed new county territory for which no petition had ever been presented; that after the board had granted the withdrawal petition and had excluded from the proposed new county the territory described in such withdrawal petition, the assessed valuation of property within the proposed new county was then less than four million dollars and only slightly in excess of three million dollars. It is further alleged that all preparations are being made for holding the election on the 25th of June, and that, if such election be held, large expenditures will be incurred and the taxes of this relator increased thereby. A motion to quash the writ was interposed and the cause argued and submitted for final determination, it being agreed that the petition contains all the facts necessary to a complete determination of the questions sought to be raised.

1. Is the remedy by *certiorari* available? Section 7203, Revised Codes, provides that the writ may be issued by the supreme court "when an inferior tribunal, board or officer,

exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy." It is urged upon us that the phrase "exercising judicial functions" gives character to the preceding words "tribunal, board or officer," and limits the exercise of this writ to a review of the acts of those tribunals which are clothed with judicial power by section 1, Article VIII of the Constitution, and the officers of such tribunals, or, in other words, that the writ runs only to courts or judges; but with this we do not agree. The common-law writ of *certiorari* issued to review the decisions of *quasi*-judicial bodies as well as those of courts. (1 Bailey on Habeas Corpus, *Certiorari, etc.*, sec. 171; 2 Spelling on Extraordinary Relief, sec. 1949; 6 Cyc. 751.) It has been the common practice to employ the writ to annul proceedings of such bodies as city councils, boards of county commissioners and the like, whenever such bodies exercised judicial functions and exceeded, or acted without, jurisdiction. So that, when our legislature employed the phrase "exercising judicial functions" above, it was intended to characterize the antecedent terms "tribunal, board or officer" and give to them a meaning which comprehends *quasi*-judicial bodies as well as courts and judicial officers strictly so called, just as they did comprehend such *quasi*-judicial bodies in the practice at the time the statute was first adopted. The question was determined by this court in harmony with these views, in *State ex rel. Buck v. Board of County Commrs.*, 21 Mont. 469, 54 Pac. 939, and we see no reason for changing our opinion.

Nothing that is said in *State ex rel. Arthurs v. Board of County Commrs.*, 44 Mont. 51, 118 Pac. 804, can be construed as conflicting with these views. In that case we assumed that the board of county commissioners was acting as a *quasi*-judicial body, but held that even so its refusal to take jurisdiction of a matter properly before it, or, after having acquired jurisdiction, its refusal to proceed, or its erroneous determination of a preliminary question of law upon which it refused to

examine the merits of the matter before it, would be corrected by *mandamus*, and further than that we did not go.

2. In proceedings for the organization of a new county, the [2] board of county commissioners is required to act as a *quasi-judicial* tribunal, within the meaning of that phrase as used in section 7203 above. Chapter 112, Laws of 1911, familiarly known as the Leighton Act, constitutes the board of county commissioners the tribunal which shall have control of the proceedings for the creation of a new county. Upon the filing of a petition the board "shall forthwith fix a date to hear the proof of the said petitions and of any opponents thereto." At the time so fixed, the board shall hear the petitioners and any opponents, and to that end "shall receive the proofs offered to establish or controvert the facts set forth in said petition or petitions," and from such hearing the board shall determine (1) the boundaries of the proposed new county; (2) whether the petition contains the genuine signatures of at least one-half of the qualified electors, *etc.*; (3) whether any line of the proposed new county passes within eighteen miles of the county seat of any county proposed to be divided; (4) whether the proposed county contains taxable property of the value of at least four million dollars; (5) whether the creation of the new county will reduce the assessed valuation of any existing county to an amount less than the minimum allowed by law; (6) whether the area of any existing county will be reduced to less than 800 square miles of surveyed land; and (7) the class to which the proposed county will belong and its name as stated in the petition. The facts required to be set forth in the petition are prescribed, and an affidavit is required that the signatures to the petition are genuine. It is very clear that every fact necessary to be set forth in the petition and affidavit is subject to be controverted by the opponents of the new county; and, if this be done in any given instance, the board must then receive evidence and render its determination thereon. While it is true that most of the facts required to be proved can be proved if they exist, by records which cannot be disputed, even so the board is required to consider the evidence, weigh the



same and deduce its determination therefrom. But assume that the petition is attacked on the ground that certain signatures thereon necessary to make up the required number are not genuine—that they are forgeries or fictitious; certain it is then that in receiving conflicting evidence upon this question, weighing the same and determining therefrom the truth or falsity of the allegation that the signatures are genuine, the board is exercising some judgment and discretion sufficient to bring its actions within the definition of *quasi-judicial* functions, as given by this court in *Bair v. Struck*, 29 Mont. 45, 63 L. R. A. 481, 74 Pac. 69.

3. A valid petition describing the territory to be included [3] within the proposed new county is the very foundation of the proceedings for the creation of a new county under Chapter 112 of the Laws of 1911, or under the amendatory Act (Chapter 133, Laws of 1913). While under certain circumstances the board is authorized to exclude territory, there is not any authority in the board to incorporate new territory for which there has not been any petition presented. This proceeding is purely statutory, and for every act of the board, justification must be found written in the statute in express terms or necessarily implied; and since there is not any authority conferred upon the board to incorporate new territory, the order of March 26, 1913, including within the boundaries of the proposed new county territory not included in the descriptions given in the petitions filed for the creation of such county, was in excess of jurisdiction and void.

4. While authority is conferred upon the board to exclude territory "upon petition of not less than fifty per cent of the [4] qualified electors of any territory lying within said proposed new county and contiguous to the boundary line of the said proposed new county and of the old county from which such territory is proposed to be taken, and lying entirely within a single old county, and described in said petition, asking that said territory be not included within the proposed new county," the authority is limited to the circumstances just enumerated. Beyond the terms of the statute the authority does not exist.

In the present instance it is alleged in the petition that the board of county commissioners eliminated from the proposed new county a large amount of territory without any petition having been presented therefor, and this allegation is admitted. The withdrawal petition mentioned in the statute quoted above is indispensable to the existence of the right to exclude, and in the exclusion of territory without such petition as the law contemplates, the board in its order of March 26 exceeded its jurisdiction, and its act in that regard was void.

5. That the board of county commissioners did not have any jurisdiction to make the order granting the petition for the creation of Toole county on March 26, 1913, or to issue the proclamation of March 27, is apparent. At the time the petition [5, 6] tions were filed (May 22, 1912), Chapter 112, Laws of 1911, was in full force and effect. At the time the order was made and the proclamation issued, that Chapter had been amended by an Act which was approved and which went into effect on March 21, 1913. (Laws 1913, p. 484.) Section 1 of the original Act contains four distinct prohibitions against the creation of a new county. Paraphrased, that portion of section 1 of Chapter 112 above, relating to this subject, would read as follows: "A new county shall not be created (1) if its creation reduces the assessed valuation of any other county to less than five million dollars; or (2) if its creation reduces the area of any existing county to less than 800 square miles of surveyed land; or (3) if any line of the proposed new county passes within eighteen miles of the county seat of any old county proposed to be divided; or (4) if the new county has not property of the assessed valuation of four million dollars." As indicated above, the statute enjoins upon the board the duty to ascertain and determine that the proposed new county does not infringe upon any of these prohibitions, and if it does, the end of the proceeding for its creation is at hand. The board must find affirmatively "that the proposed new county contains property of an assessed valuation of at least four million dollars." This is jurisdictional, and without this finding the board cannot proceed under Chapter 112 above. At the hearing

had on March 26, 1913, the board ascertained and determined that the proposed new county of Toole contains property of the value of at least \$3,000,000. That this finding is not sufficient to warrant the board in proceeding further, and that all subsequent proceedings were and are void, must be conceded if the action of the board is to be controlled by Chapter 112 above.

But the board apparently assumed that its action was to be governed by the amendatory statute which had been approved and went into effect five days before the meeting of March 26 was held. The amendatory Act follows the original Act in enumerating the prohibitions 1, 2 and 3, but amends the original Act by substituting "three millions" for "four millions" as the minimum assessed valuation of the proposed new county. The board's determination is justified if the proceedings had been taken under the amendatory Act, but is not justified under the original Act. And this brings us to a consideration of the question: What was the effect upon the pending proceedings of the amendments to Chapter 112, there being no saving clause in the amendatory Act?

Section 119, Revised Codes, provides: "Where a section or a part of a statute is amended, it is not to be considered as having been repealed and re-enacted in the amended form, but the portions which are not altered are to be considered as having been the law from the time when they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment." This merely states a general rule as it was recognized by the authorities at the time our Codes were adopted. (Black on Interpretations of the Laws, sec. 133; 36 Cyc. 1083; *Ely v. Holton*, 15 N. Y. 595; *Moore v. Mausert*, 49 N. Y. 332.) In *City of Helena v. Rogan*, 27 Mont. 135, 69 Pac. 709, this court said: "Where a provision is amended by an Act using the words 'to read as follows,' it must be the intention of the lawmakers to make the amendment a substitute for the old provision, and to have it take its place exclusively." The same rule is stated in 1 Lewis' Sutherland on Statutory Construction, second edition, section 237, as follows:

"The amendment operates to repeal all of the section amended not embraced in the amended form. The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts or the changed portions are not to be taken to have been the law at any time prior to the passage of the amended Act." The effect which an amendment has upon pending proceedings is tersely stated by the supreme court of Indiana, in *Mayne v. Board of Comms.*, 123 Ind. 132, 24 N. E. 80, as follows: "It may be conceded, when one or more sections of a statute are amended in the mode prescribed by the Constitution, that the amended sections cease to exist, and the sections as amended are, in effect, incorporated into the original Act; but when the new law is a substantial re-enactment of the old, merely changing modes of procedure, but not changing the tribunal or the basis of the right, and when it takes effect simultaneously with the repeal of the old Act, it will be presumed, even without an express saving clause that the legislature intended that proceedings instituted under the old law should be carried to completion under the new." The converse of this proposition is equally true: If the amendment changes the very basis of the right or affects the jurisdiction, it cannot be that the legislature intended the proceeding to be completed under the new Act. From March 21, 1913, there was not any statute authorizing the creation of a new county with a minimum assessed valuation of property of four million dollars. The provision fixing that minimum limit was repealed by the new Act. Prior to that date there was not any statute authorizing the creation of a new county with an assessed valuation less than four millions. The provision for a new county based upon an assessed valuation of three millions as the minimum dates from the 21st day of March, 1913. It will be observed from a consideration of the original Act and the amendatory statute that the value of the assessable property has at all times been the very basis for the creation of a new county. While the statute authorizes withdrawals of territory from the proposed county as

its boundaries are prescribed in the petitions for its creation, yet the statute declares that whenever by such withdrawals the assessed valuation is reduced below the minimum, "then such new county shall not be created or organized." Again, each of the statutes specifically enjoins upon the board the duty to ascertain and declare affirmatively that the proposed new county contains property of the value equal to or exceeding the minimum provided by law. The change wrought by the amendatory statute affects the very basis of the proceedings and the jurisdiction of the board, and therefore the new Act cannot control proceedings pending at the time it went into effect.

Every elector who signed a petition for the creation of Toole county did so with the knowledge and understanding that whatever withdrawals of territory might be had, the remaining property within the new county must have a valuation of at least four million dollars, or the proceedings for its creation would fail. It would be absurd to say that the men who signed a petition under those circumstances consented to the creation of a new county with property of an assessed valuation of only three million dollars. The rate of taxation in a county having only three millions might be very much greater than in a county with four millions; but whether it would be or not, the statute does not authorize the board to substitute for the petition which the electors have presented, a petition based upon an entirely different set of circumstances or to act without any petition at all. There never was a petition presented to the board for the creation of Toole county with an assessed valuation less than four millions, and therefore the order of March 26, calling an election for the creation of a new county with property of the assessed value of only three millions or thereabouts, and much less than four millions of dollars, was without jurisdiction and void.

It is ordered that the proceedings of the board of county commissioners taken on March 26, 1913, including within the boundaries of the proposed Toole county certain territory not theretofore petitioned for, and in excluding from the boundaries

of said proposed county territory for which no proper withdrawal petitions had been presented, and in granting the petitions for the creation of said county, defining its boundaries, etc., as set forth in the resolution of that date, adopted by such board; and the resolution adopted on the same day postponing the election to June 25, 1913, and the proclamation for, and notice of, an election to determine whether or not the said county of Toole should be created, made and entered on the 27th day of March, 1913, be and the same are hereby annulled.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

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STATE EX REL. RASMUSSEN, RELATOR, v. BOARD OF  
COUNTY COMMISSIONERS, RESPONDENT.

(No. 3,340.)

(Submitted June 9, 1913. Decided June 19, 1913.)

[134 Pac. 296.]

(For syllabus, see *State ex rel. Jacobson v. Board of County Commissioners*, ante, p. 531.)

Original application by R. C. Rasmussen to review certain actions taken by the board of county commissioners of Teton county with reference to the proposed creation of Pondera county. Writ issued.

*Messrs. Norris & Hurd*, for Relator, argued the cause orally.

*Mr. O. W. McConnell*, and *Mr. J. A. McDonough*, for Respondent, submitted a brief; *Mr. McConnell* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

*Certiorari* to review the action of the board of county commissioners of Teton county. This proceeding was instituted by R.

C. Rasmussen, a taxpayer and qualified elector within that portion of Teton county which was sought to be organized into a new county to be known as Pondera county. On February 24, 1913, certain residents of the western portion of Chouteau county and the northern portion of Teton county presented to the county commissioners of Teton county petitions in due form, subscribed by the requisite number of electors, praying for the creation of Pondera county, to include nine townships in the western portion of Chouteau county and substantially all of the north half of Teton county. The petition recites that the property subject to taxation within the proposed new county has an assessed valuation of \$5,722,130. Notice was given and a hearing set for March 25. There was an adjournment to March 26, when the cause was taken up by the board, and upon the suggestion of J. A. McDonough, an attorney representing interested petitioners, the board eliminated from the proposed county certain territory constituting something more than a township, and upon the objection of attorney Schmidt, representing Chouteau county, the board eliminated six of the nine townships to be taken from Chouteau county. The board further entertained a withdrawal petition and granted the same, thereby eliminating substantially one-half of that portion of the territory originally sought to be taken from Teton county. The board then adopted a resolution defining the boundaries of the proposed new county as thus amended; finding the facts as required by law; divided the proposed new county into election precincts, road and school districts, appointed the necessary election officers and called an election for June 25, 1913. On March 27 a proclamation for the election was duly made and published, and this proclamation describes the boundary lines of the proposed new county as they were described in the resolution adopted on the 26th of March. On May 21 this proceeding was instituted. The petition sets forth the foregoing facts in detail, and alleges that there was not any petition for the withdrawal of the one and a half townships withdrawn at the suggestion of attorney McDonough; that there was not any petition for the withdrawal of the six townships from Chou-

teau county, and that the pretended petition for the withdrawal of territory which was considered by the board and granted on March 26 was fraudulent; that it was never signed by any of the persons whose names appeared attached to it; that originally a valid withdrawal petition had been lodged with the board of county commissioners; that it had been withdrawn from the possession of the county clerk, the printed form at the head of the petition detached, and a new and a different heading attached to the signatures, and that it was this spurious and fraudulent withdrawal petition, and none other, which was considered by the board and granted on March 26; that after the eliminations made by the board the property included within the boundary lines of the proposed county had an assessed valuation of less than four million and only slightly in excess of three million dollars. It is alleged that all preparations for the election are being made and that, if an election is had, large expenditures will be incurred and the taxes of this petitioner greatly increased thereby. The board of county commissioners appeared by motion to quash, and the cause was argued and submitted, it being agreed that the petition filed in this court contains all the facts necessary to a decision of the questions sought to be raised.

Upon the authority of *State ex rel. Jacobson v. Board of County Commissioners of Teton County, ante*, p. 531, it is ordered that the proceedings of the board of county commissioners of Teton county, taken on the 26th and 27th days of March, 1913, eliminating territory from the boundaries of the proposed new county to be known as Pondera county, and adopting resolution granting the petition for the creation of said county, describing its boundaries, *etc.*, and issuing a proclamation for, and giving notice of, an election to be held on June 25, 1913, to determine whether or not Pondera county should be created, be and the same are hereby annulled.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.



## LATIMER ET AL., APPELLANTS, v. NELSON ET AL., RESPONDENTS.

(No. 3,326.)

(Submitted May 23, 1913. Decided June 19, 1913.)

[133 Pac. 680.]

*Injunction Order—Record on Appeal—Identification of Copies—Bill of Exceptions.*

1. The copies of papers constituting the record on appeal from an order (refusing to issue an injunction *pendente lite*) must be identified as copies of the papers used at the hearing in the district court, by a bill of exceptions, settled in a certificate of the judge; a certificate by the clerk to the effect that they are correct copies being insufficient.

*Appeal from District Court, Missoula County; Asa L. Duncan, Judge.*

ACTION by John R. Latimer and others against Frank Nelson, Daniel L. McQuarrie and John J. Flynn, as the board of commissioners of Missoula county. From an order refusing to issue an injunction *pendente lite*, plaintiffs appeal. Affirmed.

Cause submitted on briefs of counsel.

Messrs. James L. Wallace, Charles N. Madeen, and W. J. McCormick, for Appellants.

Mr. Frank A. Roberts, and Mr. Dan. J. Heyfrom, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This is an appeal from an order of the district court of Missoula county refusing to issue an injunction *pendente lite*. The principal question submitted for decision involves the validity and construction of Chapter 30 of the Laws of the Twelfth Legislative Assembly. When the appeal was perfected, the plaintiffs presented to this court their petition asking that an injunction issue pending the appeal under the rule of this court relating to appeals from injunction orders. (Rule XXI,

44 Mont. xxxix.) The petition was granted upon terms, and thereafter the hearing was upon motion of counsel expedited. We are precluded, however, from considering the appeal on the merits for the reason that counsel for the appellants have failed to file a properly authenticated transcript of the record of the [1] district court upon which the order was made. The record submitted consists of the petition presented to this court at the time the injunction was issued, embodying copies of the pleadings, certain affidavits and a stenographic report of the evidence of one of the defendants. But while these are certified to by the clerk as correct copies, they are not embodied in a bill of exceptions identifying them as the papers used at the hearing in the district court. Section 7113, Revised Codes, provides: "On appeal from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below." Section 7115 provides that the copies referred to in the preceding sections must be certified to as correct by the clerk or attorneys. As has been repeatedly announced by this court, while this latter section authorizes the clerk or attorneys to certify that the copies furnished are correct copies, it does not authorize either to convey to this court in a certificate the information that the copies furnished are copies of the papers actually used as the basis of the order from which the appeal is taken. This information can be furnished only by a bill of exceptions, settled by a certificate of the judge in the usual way. (*Rumney Land & Cattle Co. v. Detroit & Mont. C. Co.*, 19 Mont. 557, 49 Pac. 395; *Cornish v. Floyd-Jones*, 26 Mont. 153, 66 Pac. 838; *Emerson v. McNair*, 28 Mont. 578, 73 Pac. 121; *In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38.) Since we are not furnished with a transcript which we can accept without question as a copy of the record upon which the district court based its order, we must observe the rule adopted in the cases cited and decline to consider the appeal on the merits. The order is therefore affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

STATE ~~EX REL.~~ CENTENNIAL BREWING CO., RELATOR, v.  
DISTRICT COURT ET AL., RESPONDENTS.

(No. 3,328.)

(Submitted May 26, 1913. Decided June 20, 1913.)

[133 Pac. 679.]

*Mandamus—When not Appropriate Remedy.*

1. *Mandamus* may not be invoked to correct a judgment entered by the district court, or where the remedy by appeal is plain, speedy and adequate.

Original application for writ of mandate to compel the District Court of Silver Bow County and Hon. Michael Donlan, one of its judges, to correct a certain judgment. Proceedings dismissed.

*Mr. Chas. R. Leonard*, and *Mr. Frank A. Walker*, for Relator, submitted a brief; *Mr. Walker* argued the cause orally.

For Respondents, *Mr. John Lindsay*, and *Messrs. Canning & Geagan*, submitted a brief; *Mr. Henry C. Smith*, of counsel, argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On March 21, 1913, an action in unlawful detainer was commenced in the district court of Silver Bow county, by the Centennial Brewing Company against O. Rouleau and Louis Tetreault, and such proceedings were had that upon the trial a verdict was returned in favor of plaintiff and against the defendants. Thereupon counsel for plaintiff requested the district court to render judgment upon the verdict in favor of plaintiff and against the defendants, and as a part of the judgment to treble the damages. This request was refused and the court rendered and had entered a judgment in favor of the plaintiff for the restoration of the premises in controversy and for damages as found in the verdict and for costs.

In effect, we are asked by the writ of mandate to correct [1] the judgment entered by the district court, but such is not the office of the writ. (*State ex rel. Montana Central Ry. Co. v. District Court*, 32 Mont. 37, 79 Pac. 546.)

Assuming that the circumstances are such that *mandamus* would issue if the plaintiff in the action in the district court had no other plain, speedy or adequate remedy, we would do a grave injustice to other litigants before this court if we permitted this relator here to invoke the remedy by *mandamus* to secure an early hearing of its controversy, while others who pursue the remedy by appeal are compelled to wait. Every question sought to be presented in this proceeding can be reviewed by appeal, and the remedy by appeal is plain, speedy and adequate. Under such circumstances *mandamus* will not lie. (Sec. 7215, Rev. Codes.)

The proceeding is dismissed.

*Dismissed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

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STATE EX REL. WILSON, RESPONDENT, v. WILLIS, CITY CLERK, ET AL., APPELLANTS.

(No. 3,344.)

(Submitted June 2, 1913. Decided June 20, 1913.)

[133 Pac. 962.]

*Mandamus—Cities and Towns—Aldermen—Vacancies—Statutes—Official Oath—Filing—City Records—Duties of Clerk—Mandamus.*

Cities and Towns—Council—Vacancies—How Filled—Statutes.

1. *Held*, that the provision of section 3236, Revised Codes, requiring "a majority vote of the members" of the city council—i. e., a majority of those constituting the actual membership of the body at the time—to fill a vacancy in an elective city office, and not section 3263, making "a majority of the whole number of the members elected" requisite for such purpose, is applicable in case a vacancy in its own body caused by resignation or death is to be filled.

Same—Council—Rights of Member Elected to Fill Vacancy.

2. Having been rightfully chosen by the city council to fill a vacancy in its own body, and after taking and subscribing the constitutional oath, an alderman had the right to have his vote on the question of filling another vacancy, caused by death, recorded, even though a certificate of election had not been issued to him, and irrespective of the mayor's refusal to recognize him or of the fact that an action to determine his official status was then pending.

Same—Alderman—Official Oath—Duty to File—Records—*Mandamus*.

3. The official oath of an alderman being required to be subscribed must be in writing, and is intended to become a record of the city; and since under section 3253, Revised Codes, the city clerk must keep all records, papers, *etc.*, of the city, he may be compelled by *mandamus* to file such oath, as well as record the vote of such alderman upon the question of filling a vacancy in the council, his vote constituting part of its proceedings at the meeting at which the vacancy was filled, of which record must be made.

*Appeal from District Court, Silver Bow County; John B. McClernan, Judge.*

PROCEEDINGS in mandate by the state, on the relation of John D. Wilson, to compel W. A. Willis, as clerk of the city of Butte, and others, to perform certain duties. Relator had judgment, and respondents appeal. Affirmed.

In behalf of Appellants, *Messrs. Alexander Mackel, Wm. F. Davis, John A. Smith, and N. A. Rotering*, submitted a brief; *Mr. Smith* argued the cause orally.

*Messrs. L. O. Evans, W. B. Rodgers, and John E. Corette*, for Respondent, submitted a brief; *Mr. Rodgers* and *Mr. Corette* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The city of Butte is composed of eight wards and its full complement of aldermen is sixteen. On April 16, 1913, John C. Smith, one of the aldermen for the third ward, resigned, and on April 23 a meeting of the city council was held for the purpose of filling the vacancy thus created. At this meeting one W. E. Rowan received the votes of eight aldermen and one James Walsh received the votes of six; whereupon the mayor declared that no election had resulted, for the reason that the votes of nine aldermen were necessary. On May 1

Rowan tendered his oath of office to the city clerk for filing and demanded of the city clerk that he file said oath and issue a certificate of election, but the city clerk refused to do either, and thereupon Rowan instituted proceedings in mandate which culminated on May 7 in the issuance by the district court of Silver Bow county of a peremptory writ requiring the city clerk to file the oath and issue the certificate, and Rowan received his certificate on that day.

In the meantime, and on April 30, John Hawke, an alderman of the fourth ward died, and on May 5 a regular meeting of the city council was held at which all the living aldermen of the city (including said Rowan) were present, together with the mayor. The matter of filling the vacancy caused by the death of Alderman Hawke was taken up, and the respondent Wilson and one John C. Driscoll were nominated, and it is alleged in the petition that Wilson received the votes of eight aldermen (including Rowan) and Driscoll received the votes of seven; whereupon the mayor, refusing to recognize the right of Rowan to vote, announced a tie vote of seven to seven and cast his own vote for Driscoll. It is further alleged in the petition that at the time of said election and before the vote was recorded, said Rowan demanded that his vote be recorded for Wilson, but this the city clerk refused to do. On May 14 Wilson tendered his oath of office to the city clerk for filing and demanded that the city clerk file the same and issue a certificate of election, which the city clerk refused to do. On May 15, Wilson commenced this proceeding to compel the city clerk by judicial mandate to record Rowan's vote for Wilson in the minutes of May 5, 1913, to file the oath of office of Wilson as an alderman of the fourth ward, and to issue to Wilson a certificate of election. An alternative writ was issued, and after a motion to quash had been filed by the city clerk and denied by the court, answer was made and a reply filed. Upon the issues thus framed the cause was heard, and upon the testimony taken the only issues of fact, viz., whether Rowan had voted for Wilson at the meeting of May 5, and whether he had demanded that his vote be so recorded, were found for the relator Wilson.

Judgment resulted awarding a peremptory writ commanding the clerk to record Rowan's vote for plaintiff and to file Wilson's oath of office. This appeal is from that judgment.

1. There is nothing before us upon which the correctness of the finding that Rowan voted for Wilson and demanded that his vote be so recorded can be assailed. The question, then, is whether he was a member of the council at the time. The appellant contends in the negative, asserting that under section [1] 3263, Revised Codes, the votes of nine members were necessary to elect Rowan, which confessedly he did not have. Section 3263 forms part of a chapter of the Political Code especially devoted to the legislative powers of cities. It was brought forward from the Political Code of 1895, where it appeared as section 4803, and its language is as follows: "The ayes and noes must be called and recorded on the final passage of any ordinance, by-law, or resolution, or making any contract, and the voting on the election or appointment of any officer must be *viva voce*, and a majority of the whole number of the members elected is requisite to appoint or elect an officer, and such vote must be recorded." If the selection, by the council, of an alderman to fill a vacancy existing in its membership is within the purview of this section, then there cannot be the slightest doubt that the contention of appellant must be upheld; for nothing can be clearer than that the phrase "a majority of the whole number of the members elected" means a majority of the entire number necessary to constitute the full membership of the council; and this, in the case of Butte, would be nine. (*Wood v. Gordon*, 58 W. Va. 321, 52 S. E. 261; *Pollasky v. Schmid*, 128 Mich. 699, 92 Am. St. Rep. 560, 55 L. R. A. 614, 87 N. W. 1030; *Pimental v. City of San Francisco*, 21 Cal. 351.) But there are excellent reasons for the belief that section 3263 is not the provision to be applied to the case of an election by the council to fill vacancies in its own body caused by resignation or death. In Article II, Chapter III, Title III, Part IV of the Political Code, which is devoted to the general subject of municipal officers and elections, we find section 3236: "When any vacancy occurs in any elective office, the council, by a

majority vote of the members, may fill the same for the unexpired term, and until the qualification of the successor. A vacancy in the office of alderman must be filled from the ward in which the vacancy exists, but if the council shall fail to fill such vacancy before the time for the next election the qualified electors of such city or ward may nominate and elect a successor to such office. The council, upon written charges, to be entered upon their journal, after notice to the party and after trial by the council, by vote of two-thirds of all the members elect, may remove any officer." This section was enacted in 1903, and, being the later legislative utterance upon the subject, must control if any substantial conflict exists between its provisions and those of section 3263. It is to be observed that by section 3236 "a majority vote of the members" is required to fill a vacancy, whereas two-thirds "of all the members elect" is required to remove from office. Both of these phrases are designed as bases upon which to determine the sufficiency of the vote, and it must be presumed that in the enactment of this statute the legislature had in mind a distinction as real as the language, under settled construction, expresses. No case called to our attention or revealed by our own researches, nor any analysis of the language independent of authority, suggests that the phrase "a majority of the members" could mean more than a majority of those constituting the actual membership of the body at the time; so that, if the full membership is sixteen but at a given time has been in fact reduced by the resignation of one, there are but fifteen members. (*State ex rel. Attorney General v. Orr*, 61 Ohio St. 384, 56 N. E. 14; *People ex rel. Funk v. Wright*, 30 Colo. 439, 71 Pac. 365; *Board of Commrs. v. Wachovia Land & Trust Co.*, 143 N. C. 110, 118 Am. St. Rep. 791, 55 S. E. 442.) Hence, as long as there is a quorum present, a majority of fifteen, or eight, will elect to fill a vacancy. (*Nalle v. City of Austin*, 41 Tex. Civ. App. 423, 93 S. W. 141; *People ex rel. Funk v. Wright*, *supra*.)

We are not called upon to determine whether a majority of a bare quorum will suffice, as suggested by the respondent; nor what might be the situation if ten of the aldermen were



killed at one time, as suggested by the appellant; happily neither situation is presented, and we confine ourselves to a determination of the case as made by the record.

2. It is next contended that even if Rowan was in fact elected as alderman prior to the meeting of May 5, still no certificate [2] of election had been issued to him, no recognition had been accorded him by the mayor, and no final decision had been rendered as to his status by the court in which the matter was pending, and therefore he was not entitled to vote. The only office a certificate of election could have performed was to officially inform the council of the election of Mr. Rowan; but they required no such information. Having elected Mr. Rowan by their own official action, they had official cognizance of it and the certificate was not necessary. Neither did the right of Rowan to participate in the meeting of May 5 depend upon recognition by the mayor or the decision of the district court. It depended upon whether he had been in fact chosen by the council and whether he had taken and subscribed the constitutional oath; both conditions having been met, there was no legal obstacle to the exercise by him, on May 5, of all rights and privileges of the office.

Since Rowan was properly present and participating in the meeting of May 5, and since he then voted, and demanded that his vote be recorded, for the respondent Wilson, it follows that Wilson had eight votes. By the death of Hawke, the actual membership of the council at the time was fifteen, and eight was sufficient. Wilson was therefore duly elected alderman and is entitled to be seated as such.

3. Then, if this is so, appellant argues that a reversal of [3] the case should follow because no right of Wilson's was invaded by the omissions complained of, and because the statute does not require the clerk to file the oath. We do not appreciate the argument. Doubtless, the present form of action was employed primarily to ascertain whether Wilson had been elected; but, having been elected, he was required not merely to take but to subscribe the constitutional oath. (Rev. Codes, sec. 3248.) This means that the oath must be in writing, and

it cannot be supposed that, having subscribed the written oath, the officer should then throw it away or carry it about upon his person. Clearly the oath, when taken and subscribed, was intended to become a record of the city. Again, the vote of Rowan for Wilson was part of the proceedings of the council at the meeting of May 5 and it constituted evidence of Wilson's right to the office which, together with the vote of the other members, it was necessary should be recorded fully and accurately. By section 3253, Revised Codes, it is made the duty of the clerk to file and keep all records, books and papers belonging to the city, and also to record the proceedings of the council. We see no reason why he should not be compelled by mandate to perform either duty when he has failed therein.

The judgment appealed from is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

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ANDREE, RESPONDENT, v. ANACONDA COPPER MINING CO., APPELLANT.

(No. 3,268.)

(Submitted May 24, 1913. Decided June 23, 1913.)

[133 Pac. 1090.]

*Personal Injuries—Master and Servant—Defective Appliances—Evidence—Insufficiency—Nonsuit.*

Personal Injuries—Defective Appliances — Evidence — Nonsuit—Improper Refusal.

1. Evidence in an action by a sawmill employee to recover damages for injuries sustained while unloading logs from flat cars, alleged to have been caused by defendant's negligence in furnishing a defective chain with which to tie the logs, *held*, not to show that the accident was due to any omission of duty on the part of defendant, rather than to the negligence of plaintiff himself, but to present a case in which a motion for nonsuit should have been sustained, for lack of a showing of a direct causal connection between the negligence alleged and the injury—the cause of the accident being left to conjecture.

Same—Conjecture as to Cause—Nonsuit.

2. While a showing that the personal injury made the basis of plaintiff's action is more naturally attributable to the negligence alleged in his complaint than to any other cause is sufficient to make out a *prima facie* case, evidence which leaves it doubtful whether the injury may not with equal propriety be attributed to one or more causes other than that alleged does not suffice to meet such requirement.

*Appeal from District Court, Ravalli County; R. Lee McCullough, Judge.*

ACTION by J. A. Andree against the Anaconda Copper Mining Company. Judgment for plaintiff, and defendant appeals from it and an order denying its motion for a new trial. Reversed and remanded.

Mr. R. A. O'Hara, and Mr. Henry C. Stiff, for Appellant, submitted a brief; Mr. Stiff argued the cause orally.

There is no direct or positive evidence in the record to sustain the allegation of a defective toggle. The theory upon which counsel for respondent apparently tried the case was, that as the toggle became unfastened, it must of necessity have been defective. Unless the doctrine of *res ipsa loquitur* applies, it cannot be said there was sufficient evidence supporting the allegation that the toggle was defective to justify the submitting the case to the jury. (*Steffen v. Chicago & N. W. Ry. Co.*, 46 Wis. 259, 50 N. W. 348.)

The burden of proof was upon respondent to show that the injuries claimed to have been sustained by him were the result of the alleged negligent acts of appellant. "Negligence will not be presumed, but must be made to appear." (*Masich v. American Smelting Co.*, 44 Mont. 36, 118 Pac. 764; *Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515.)

The doctrine announced in the last case cited above was approved in the case of *Winnicott v. Orman*, 39 Mont. 339, 102 Pac. 570.

We think it can be properly said that the evidence produced by plaintiff himself showed that he was fully aware of the conditions existing, and that with such knowledge he voluntarily and unnecessarily placed himself in a dangerous position, and

while in such position carelessly, and it might be said even recklessly, with his hand, pushed the toggle of the upper chain, whereupon it became unfastened, and some of the logs rolled off the car and, striking him, inflicted whatever injuries were by him sustained, and we think it was the duty of the court as a matter of law to say, at the close of plaintiff's testimony, that on the showing made he was not entitled to recover, and that the case should not have been submitted to the jury, and that the motion for a nonsuit should have been sustained.

Upon the proposition of the appreciation of danger by the person injured, see the following cases: *Schroder v. Iron Works*, 38 Mont. 474, 100 Pac. 619; *Stewart v. Pittsburg Copper Co.*, 42 Mont. 207, 111 Pac. 723; *McAllister v. Rocky Ford Coal Co.*, 45 Mont. 433, 123 Pac. 696.

*Messrs. W. P. Baker, C. S. Wagner, and E. C. Kurtz*, for Respondent, submitted a brief; *Messrs. Wagner and Kurtz* argued the cause orally.

There is no positive or direct testimony advancing any theory or reason causing the toggle to become unfastened. Defendant did not offer to prove any cause, nor is there any proof in the record to the effect that the toggle was not defective. There is, however, positive and direct proof that when a toggle is in proper condition, it will not become unfastened by pushing it over the hand. There was no way in which plaintiff could establish any cause or reason for it becoming unfastened, except by showing the accident and the surrounding circumstances, and by witnesses with special knowledge and experience. We believe that such evidence was proper, and we respectfully submit the following authorities, which we believe lend support to our contention: *Copenhaver et al. v. Northern Pac. Ry. Co.*, 42 Mont. 453, 113 Pac. 467; Wigmore on Evidence, sec. 1925, 1926, 1976; *Dyas v. Southern Pac. Co.*, 140 Cal. 296, 73 Pac. 972; *Webster Mfg. Co. v. Mulvanny*, 168 Ill. 311, 48 N. E. 168; *Donk Bros. Coal & Coke Co. v. Stroff*, 200 Ill. 483, 66 N. E. 29; *People v. Durant*, 116 Cal. 179, 48 Pac. 75; *Yeager v. Southern Cal. Ry. Co.*, 5 Cal. Unrep. 870, 51 Pac. 190; *Boston v. Hewitt et al.*, 8

Okl. 401, 58 Pac. 619; *St. Louis & S. F. R. Co. v. Noland*, 75 Kan. 691, 90 Pac. 273; *Welch v. Fransioli*, 46 Wash. 530, 90 Pac. 644.

Where the master owes to the servant a duty to use care, and the thing causing the accident is shown to be under the management of the master, and the accident is such that in the ordinary course of things it does not occur if those who have the management or control use proper care, the happening of the accident in the absence of evidence to the contrary is evidence that it arose from a lack of requisite care. (*Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29; 29 Cyc. 590; *John v. Northern Pacific Ry. Co.*, 42 Mont. 18, 111 Pac. 632; *Graaf v. Vulcan Iron Works*, 59 Wash. 325, 109 Pac. 1016.)

It was not necessary for plaintiff to prove absolutely that the accident arose from the defective toggle. All that was necessary was to make it appear to be more probable that the accident resulted from a defective toggle than from some other cause. (*La Bee v. Sultan Logging Co.*, 47 Wash. 57, 91 Pac. 560; *Cleary v. General Contracting Co.*, 53 Wash. 254, 101 Pac. 888; *Coleman v. Mechanics' Iron Foundry Co.*, 168 Mass. 254, 46 N. E. 1065.) Surrounding circumstances may afford as conclusive proof of the master's negligence as direct testimony. (*Woodman v. Metropolitan R. Co.*, 149 Mass. 335, 14 Am. St. Rep. 427, 4 L. R. A. 213, 21 N. E. 482; *McCord v. Atlanta & C. Air Line Co.*, 134 N. C. 53, 45 S. E. 1031; *Northern P. R. Co. v. Hess*, 2 Wash. 383, 26 Pac. 866; *Chenall v. Palmer Brick Co.*, 117 Ga. 106, 43 S. E. 443.) So it has been held that the mere fact that a steel rail fell from a car, one end striking the ground and the other end sweeping along the side of the train and striking and killing a brakeman, was sufficient to raise a question of negligence for the jury, although there were no other circumstances indicating negligence. (*McCray v. Galveston, H. & S. A. R. Co.*, 89 Tex. 168, 34 S. W. 95; *Stewart v. Ferguson*, 164 N. Y. 553, 58 N. E. 662; *Lentino v. Port Henry Iron Ore Co.*, 71 App. Div. 466, 75 N. Y. Supp. 755.) In the case at bar there was not only proof of an injury, but there was also proof showing how the injury happened, and the manner in which

the injury was produced. Under these circumstances, the jury had a right, without proper explanation on the part of the defendant, to infer that the toggle was defective, and that the defendant had been negligent. (*Howser v. Cumberland etc. R. Co.*, 80 Md. 146, 45 Am. St. Rep. 332, 27 L. R. A. 154, 30 Atl. 906; *Benedick v. Potts*, 88 Md. 52, 41 L. R. A. 478, 40 Atl. 1067.)

The argument of counsel for appellant that there is no direct or positive evidence of a defective toggle would seem to infer that such evidence is always necessary. Authorities are practically uniform in their holding that such evidence is not always required. (See *Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515; *Beeler v. Butte etc. Development Co.*, 41 Mont. 465, 110 Pac. 528.) Furthermore, it is not always necessary to show what the exact nature of the defect was. (*Nelson v. St. Paul Plow Works*, 57 Minn. 43, 58 N. W. 868; *Atchison etc. Co. v. Lannigan*, 56 Kan. 109, 42 Pac. 343; *Magnum v. Bulion etc. Co.*, 15 Utah, 534, 50 Pac. 834.)

This court has often announced the rule that, where different conclusions may reasonably be arrived at from the evidence in the case, as to whether there was negligence on the part of the employer, the question is one of fact to be submitted to the jury. (See *Domitrovitch v. Stone & Webster Engineering Co.*, 44 Mont. 7, 118 Pac. 760; *Maw v. Coast Lumber Co.*, 19 Idaho, 396, 114 Pac. 9; *Keast v. Santa Ysabel Gold Min. Co.*, 136 Cal. 256, 68 Pac. 771; *McCabe v. Montana Cent. Ry. Co.*, 30 Mont. 323, 76 Pac. 701.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for personal injuries suffered by plaintiff during the course of his employment by defendant at its sawmill at Hamilton, Ravalli county. The defendant transports its supply of logs to the mill by a railway extending to its forest lands distant therefrom about fifteen miles. The logs are loaded lengthwise on flat cars and are held in place by binding chains. Two chains are used on each car. One end of the first is passed around the middle of the lower half of the load, and, being

drawn tight, is made fast to the other end by means of a finger-link or "toggle" with which the latter is provided. When the chain is adjusted the finger of the finger-link points upward. The length of the chain is such that when it has been secured in place, a portion of it, consisting of a few links, called the "slack," hangs loose. The link at the end of the slack is hooked over the end of the finger in order to prevent the ring, which holds the finger in place, from slipping off and releasing the chain. The second chain is passed around the entire load and is secured in the same manner. The load is further secured by stakes along the sides of the car. A log train consists usually of fifteen cars. When a train reaches the mill it is placed on a track extending along skidways at the pond, and on an incline toward the pond. When the stakes are removed and the chains released, the logs will generally of their own weight roll from the cars upon the skidways and thence into the pond. The ends of the chains are fastened together on the side from which the unloading is done, because the logs would otherwise carry the chains into the pond. The work of unloading is done by persons who are employed exclusively for that purpose. In unloading a car, the stakes are removed, the slack end of the chain to be released is unhooked from the finger of the finger-link, and the link is tripped, releasing the chain. The lower chain is released first. The operation of tripping is accomplished by means of a trip chain. This is provided at one end with a hook which the operator hooks into the finger-link in such a way as to enable him by a quick jerk, after removing the slack, to disengage the finger by forcing off the ring, thus allowing the ends of the binding chain to part. The trip chain is of sufficient length to permit the operator to stand beyond the end of the car and out of the course of the logs as they roll from the car. It sometimes happens that a finger-link becomes jammed or is "grabbed" so that it cannot be tripped by means of the trip chain. The operator then releases the load by cutting one or both of the binding chains on the opposite side of the car with an implement supplied him for that purpose. It is frequently the case that the operator finds the upper chain lying over the lower in such a way as to

prevent the lower from being readily tripped. When this is so, it is necessary for him to push the upper chain off. This is done by the hand or with a peavy, and ordinarily without trouble or danger. At the time of the accident the plaintiff was engaged in unloading logs from defendant's cars. He had unhooked the slack from the finger-links of both chains preparatory to tripping them in the usual way and had hooked his trip chain into the finger-link in the lower chain. Finding that the upper chain was in the way, he undertook to push it aside with his hand. While he was doing this, the finger-link was tripped with the result that the logs in the upper part of the load suddenly rolled upon the skidway, catching and seriously injuring him.

It is alleged in the complaint that the defendant was guilty of negligence, (1) in so loading the car that the "toggle" of the upper chain was superimposed upon the "toggle" of the lower chain, thus causing it to interfere with the free manipulation of the latter, and (2) in furnishing for use as such upper chain "a chain provided with an unsound, insecure and defective toggle," thus rendering the unloading of the car highly dangerous and unsafe. The answer joins issue upon these allegations, and alleges the usual affirmative defenses of contributory negligence, assumption of risk on the part of plaintiff, and negligence of his fellow-servants. The plaintiff had verdict and judgment. The defendant has appealed from the judgment and an order denying its motion for a new trial.

At the close of plaintiff's evidence, counsel moved the court to take the case from the jury and render judgment for the defendant. One ground of the motion was that the evidence did not tend to show that any act or omission of defendant was a proximate or remote cause of plaintiff's injury. The overruling of this motion presents the only question which we are required to determine. Though, after the motion was denied, several witnesses were called on behalf of defendant, no one of them deposed to any fact which materially aided plaintiff's case. Whether, therefore, he made out a case for the jury depends upon his own testimony and that of the witnesses called



by him. The evidence of these witnesses is so voluminous that it cannot be quoted at length. The plaintiff had been in the employ of the defendant about three months. He and his principal witness, Biddiscombe, were assigned the duty of unloading the trains as they came in, and this was their only duty. The following excerpts from the testimony are sufficient to show the circumstances of the accident:

The plaintiff testified: "I never loaded the logs and don't know if I can demonstrate how they are loaded or not. The chains are supposed to be so that you can work one without interference by the other. We take our trip chain the first thing we do and walk in and hook it onto the chain we want to trip. The logs on the car which I was unloading were hanging out and if the car is on an incline, the track being also inclined, the springs come down making the incline considerable. The toggle of the upper chain was on the toggle of the lower chain so as to stop me from tripping the link off; so I went in there and pushed the top chain over. I was reaching up a little and as I pushed it, the jar of it tripped it off. There was nothing to stop the logs and they came loose and the first one hit me and knocked me down. \* \* \* I hooked my trip chain in the bottom chain so I could not trip that one without moving the top chain from over the top of the toggles, and when I did that it came loose and that is all I remember for a time until I came to. I could not tell from where I stood and reached up to push over the top chain, whether there was any defect in it. \* \* \* They [the chains] were crossed. Being crossed, in the performance of my duty there it was necessary in order for me to trip the load, \* \* \* to push the top chain away further from the toggle of the bottom chain so I could trip it. I was trying to do that when it came loose and the logs tumbled down on me. The toggle of the top chain came loose. When I went in there I went in to trip the bottom chain. I walked in and put my trip chain on the bottom chain and took the slack off the toggles of both chains. The toggle must have come loose because the logs came down and struck me. \* \* \* When I came to, the top chain was tripped and the bottom chain

was still holding. \* \* \* When I was hurt I was in my regular employment. While working there I think I was a careful man, as careful as anybody could be. Q. At the time you unloaded these logs or attempted to unload them, could you discover from where you were standing any defects in the toggle? A. I could not discover that defect; no. Q. What defect did you have reference to? A. The finger being short. Q. Mr. Andree, from your knowledge of some three or four months there and what you did and what happened there, what would you say, if anything, was there any defect in the toggle or chain on that load? A. Yes, there was. Q. What would you say it was? A. The finger was short. \* \* \* I found toggles crossed or the chains on each other before the time I was hurt. In such cases it was my duty to uncross them or to go around on the other side of the car and cut the chain. I have cut the chains because we couldn't unfasten them any other way. \* \* \* We were furnished with appliances for cutting chains when we considered it necessary. There were nippers there that would cut the chains with very little work. I understood that when the logs could not be safely unloaded otherwise, the chains were to be cut. I don't know that Biddiscombe had any authority over me, any more than that he hired me. I knew when I went in to hook the trip chain I was taking chances. I knew if one of the logs should come down on me it would be liable to kill me or to do me great injury. I knew that all the time. I knew if any mistake or miscue was made in tripping the chain or unloading the logs and one of the logs caught me, I was liable to be all in. \* \* \* There was nothing to prevent me if I saw fit to cut the chain or trip the top chain. I always consulted Biddiscombe before cutting a chain, as he was the foreman. \* \* \* I consider myself a man of intelligence and prudent in the ordinary affairs of life. I went up and put my hand on that toggle and pushed it over without noticing its condition. It was impossible to notice. I never heard of another accident of this sort. I do not know whether, when I turned the chain over, I brought pressure on it so that it was released. If the logs are hanging in the chain, there is pressure on the

chain. That is what holds the finger of the toggle and link in position. Yes, I said the chains were one over the other. When I went to release them I could not trip the lower chain until the upper chain was moved. They were crossed right over the toggle. I didn't try to trip the lower chain first. I could tell by looking at it. I have seen both men that worked it before me unloading logs in the same condition that was in. I do not know how long the chain was. There must have been some pressure against the chain that I pushed over, because as soon as I did the logs fell on me. I had had sufficient experiences of the toggle coming in that shape, that is, one over the other. It was not an unusual condition. I have observed the loading of these cars in the woods. You could not tell whether they come into the yard in the same condition in which they are loaded. You would have to follow them down to tell about that. I have seen them loaded in the woods practically in the same way as they loaded these loads. \* \* \* It was not an unusual thing for cars to come in with the logs on them in the same condition that these were. I want to modify my statement: it was not an extraordinary happening. We might get one car like that in two or three days; get another car in a train of fifteen or twenty cars; get another one on a train to-day and one tomorrow, and may be not another for a week. I had occasion to see them quite often, but that was not the way they generally loaded them in the woods. Q. Then you consider that the condition of the car was due to a fault in the loading of the car; the condition of the chains which caused one chain to be imposed upon another? A. Yes, sir; I considered that to be the real cause of my injury. If the loading had not been defective, the chains would not have been crossed. I thought at the time, and think yet, that the chains were put that way at the time the logs were loaded, and I can see the condition in which they were. \* \* \* Yes, I moved that chain with my hand intentionally and deliberately, knowing if anything happened to it I would get my body crushed or maybe killed. I knew if it came loose I was liable to be killed. I could have gone to the other side of the car and cut the chains. Our method of work-

ing was to fasten the trip chain and get the other end of it and in that way get out of danger's way. If I put a trip chain on it and walked out to the end of it and tripped the toggle, I wouldn't be taking any chances." In another place in his testimony he said: "I did not know at the time it was possible for a finger to come off that way, the way it did, before it did. That was the first time I ever saw it done, a link to come off the finger in that particular way. \* \* \* I walk in and hook this trip chain in and then take the slack off those chains, off the fingers, both of them. There is the slack of each chain, on the bottom and top chain both; and when I took them off I could see that the finger on the link of the lower toggle could not be tripped on account of a toggle on the upper chain being in the way of it; so I just took it and pushed it over a little bit, and that's the last I remember of for the time being."

The witness Biddiscombe testified: "I was supposed to be foreman there, I guess, and just one man with me. While Mr. Andree was employed there he could have cut the chain without my telling him. I told him not to cut any unless it was absolutely necessary to cut them. I considered it absolutely necessary when the chains were grabbed or caught on the car, when the finger catches so there is no way to get the finger off the link, either that or grabbed, just the two conditions. \* \* \* There is no danger in going in and pushing a toggle over so you can trip the chain if everything is all right. The trip chain should be put on the bottom chain first. If the toggle or upper chain is in the proper condition there would be no danger in pushing it over. I have done it thousands of times with my peavy. \* \* \* There would be no danger in shifting that over at all. It could not well be unless the finger is short, to shove that over with his hand, and if that was a short finger a man's hand slipping it over, that would probably make it come loose. Nothing else could happen in shoving it over; the link would have to slip off the chain. \* \* \* A man standing on the ground or skidway for the purpose of hooking the trip chain would stand with his head—if he was a man of ordinary height—about even with the bunker of the car, and of course the toggles of the

chains would be higher up than his head. The upper and lower toggle are generally about opposite each other. \* \* \* It would be no trick at all for me to see it. The logging train comes down ten or fifteen miles, and the jostling of the train and the slipping of the logs would have a tendency to loosen the toggle before the train got to the pond if the finger was a short one. \* \* \* When a man takes the chain off it will stay in the same position until he goes to push it over or move it, and then it flies up. If I were going to push one of the toggles off the other I would grab it and put my thumb over the link and keep the link from slipping off the finger of the toggles. I would do that as an act of caution. \* \* \* A man standing on the skidway and pushing one toggle off the other would push upwards. If a man were to push upwards on the toggle he would be doing a careless and improper thing. I don't know what he would want to do that for. \* \* \* For cutting chains when it became necessary, we had a pair of chain cutters. They were there on that occasion. There was nothing unusual or extraordinary about the chains being crossed. It was not uncommon; it was a common thing. Andree must have known that, as he worked his shift night about with me. His opportunities for knowing were just the same as mine. I don't remember ever cutting a chain under any conditions other than they were grabbed and when they caught in the bottom of the car. I think I told Andree not to cut any more chains than he could possibly help; not any more than was necessary. \* \* \* I do not know what was the condition of the toggle of the particular chain which came unloosed when Andree was hurt. I didn't observe it before the accident."

The witness Rooney, who had theretofore been employed by the defendant to unload cars, testified: "A person could not tell by looking at it when the logs came down in that way, whether the toggle was proper or not. When the chain is taken off, as a rule the link remains in the same condition until there is some jar of some kind which may move it around. The fact of the moving of the train might have some effect on the links moved up or down, that would depend upon the strain upon the logs

and the chain. When the chain is taken off and the toggle receives a jar, that would cause the link to slip up. When you have a proper toggle it requires quite a force to unsnap or trip it. The links in the trip chain are about one-quarter inch in size. I have used force enough in tripping the toggles to break the trip chain. \* \* \* It was possible for a toggle to become defective on the way down from the woods. It might be in good condition when the train started with the logs and by the time it reached the pond it might be in bad shape. \* \* \* During the time I was working there, toggles became defective. They would go on the works [to the woods?] in good condition and become defective in loading, hauling and unloading logs. \* \* \* If a man left the slack of the chain on there while he was removing the upper toggle from the lower one, he would be taking less chances than if he undertook to move it after the chain had been removed."

The chain in question was not exhibited to the jury. It was not examined by any witness after the accident occurred. For demonstrative purposes there were exhibited to the jury two other chains. The witness Rooney was questioned with reference to one of these, as follows: "Q. Referring to the toggle presented in court by the plaintiff, but which has not been introduced in evidence, I will get you to tell the jury what is the matter, if anything, with that toggle as it now presents itself to you? A. The toggle might be all right enough, but the strain coming down there might bend that. Q. So a short toggle is due to the fact that a strain has been placed upon the finger at or near the bend, which has increased there and thereupon the finger has become shorter? A. Yes, sir. Q. Now, then, Mr. Rooney, I will get you to tell the jury whether or not that bent condition of the finger is not apparent to any log unloader when he approaches the load of logs? A. If he examined it close it might. Q. Would it not be apparent without close inspection? A. Not necessarily. Q. You know that it is bent out of shape now? A. Yes. Q. You knew that when you saw it? A. By examining it closely. Q. Does it require any closer inspection than now, say three feet distant? A. No."

These excerpts include all the evidence tending to show the [1] cause of the accident. Taking it at its utmost probative value, it does not tend to show that plaintiff's injury was due to any omission of duty by the defendant, rather than to the negligence of plaintiff himself. Neither the plaintiff nor Biddiscombe observed the condition of the chain before or after the accident. While both ventured the opinion that the accident would not have occurred if the finger had not been too short, neither had any knowledge that such was the case. Let it be assumed that, in view of their experience in that kind of work, their opinions are entitled to some weight as tending to show that the link was defective, that the accident would not have occurred but for the existence of the defect, and that in the absence of evidence pointing to another efficient cause, a case would be made which would call for explanation by the defendant, under the rule as stated in *Callahan v. Chicago etc. Ry. Co.*, ante, p. 401, 133 Pac. 687, nevertheless the circumstances furnish the basis for an inference equally as conclusive that plaintiff brought the injury upon himself by his own negligence. If it be conceded that the loading had been negligently done because the upper chain was superimposed upon the lower, this was observed by the plaintiff, and if this added to the danger, he was made fully aware of the fact and should have conducted himself accordingly. His experience because of which he was willing to express his opinion that the finger was defective should have guided his conduct with reference to this condition. Though because of his position on the ground he was compelled to reach upward, with the necessary result that the force applied to move the upper chain would also tend to move the ring off the finger and thus release it, he first unhooked the slack when there was no occasion to do so, and without the least attention to the condition of the link proceeded to move the chain by pushing it. This, to quote the words of Biddiscombe, was "a very careless and improper thing." According to the testimony of this witness and that of Rooney, the plaintiff should, as a precaution to prevent just what occurred, have left the slack-guard in place, or, at least, have held the ring

with his thumb until he had accomplished the removal of the chain. So that, assuming that the finger was short because it had become bent, it cannot be inferred from the circumstances attending the accident that it was due wholly to the condition of the finger-link, rather than to plaintiff's own negligence as the sole, or at least a contributing, cause. In other words, the answer to the question whether the injury was due either to the negligence of the defendant in loading the car or the defect in the link, or to both, or, on the other hand, to the careless conduct of the plaintiff in manipulating the chain, is left to rest entirely in conjecture. Upon this condition of the evidence a verdict for the plaintiff cannot stand, because it fails to show a direct causal connection between the negligence alleged and the injury, in the sense in which the rule of law applicable requires. "The nonexistence of a legal connection between the negligence and the injury is predicable whenever, for aught that appears, the accident might have happened even if the defects in question had not existed, or if the precautions which were omitted had been taken. The master cannot be held liable if his negligence was merely a condition as opposed to the efficient cause of the injury." (2 Labatt on Master and Servant, sec. 803.)

In *Patton v. Texas & Pac. Ry. Co.*, 179 U. S. 658, 45 L. Ed. 361, 21 Sup. Ct. Rep. 275, the rule applicable here is stated as follows: "And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs." This passage was quoted by this court with approval in *Shaw*



v. *New Year Gold Min. Co.*, 31 Mont. 138, 147, 77 Pac. 515; and the rule as stated was therein approved. (See, also, *Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243; *Olson v. Montana Ore Pur. Co.*, 35 Mont. 400, 89 Pac. 731; *Winnecott v. Orman*, 39 Mont. 339, 102 Pac. 570.)

It is sufficient to make out a *prima facie* case if the plaintiff [2] can show that the injury is more naturally to be attributed to the negligence alleged than to any other cause (*Griffin v. Boston & Albany Ry. Co.*, 148 Mass. 143, 12 Am. St. Rep. 526, 1 L. R. A. 698, 19 N. E. 166); yet this requirement is not met if the evidence leaves it doubtful whether the injury may not with equal propriety be attributed to one or more causes other than that alleged. We have so far assumed that the position of the chains upon the car and the condition of the link point to negligence on the part of defendant. When we view the evidence as a whole, however, it is doubtful whether the condition of the chains was not the result of a shifting of the load produced by the jar incident to the movement of the car during the haul to the mill. If this was the fact—and it was not an unusual occurrence for cars to be found in that condition upon their arrival at the mill—it is fair to conclude that the increased peril thus brought about was one of the ordinary risks of the employment which the plaintiff was hired to assume. From this point of view, the defendant was not chargeable with negligence because of the defect in the link, unless it owed the duty of having the cars inspected before the unloading began. It is a fair inference that this was a part of plaintiff's duties. If it was not, the omission by defendant to have the inspection made by others is not the negligence alleged as the ground of recovery in this case. The motion for nonsuit should have been granted.

The judgment and order are reversed and the cause is remanded for a new trial.

*Reversed and remanded.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

STATE EX REL. DANAHER, APPELLANT, v. RAY, REGISTER OF  
LANDS, RESPONDENT.

(No. 3,310.)

(Submitted June 10, 1913. Decided June 26, 1913.)

[133 Pac. 961.]

*Mandamus—Writ Does not Lie, When.*

1. *Mandamus* does not lie when the writ will accomplish no beneficial result, as where an official act (the issuance of a certificate of sale of state land by the register of state lands) is sought to be compelled, which depends upon the approval or co-operation of a third person (the governor, as president of the board of land commissioners), not a party to the proceeding.

*Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.*

APPLICATION by the state on the relation of Mary M. Danaher for writ of mandate to compel F. H. Ray, register of state lands, to issue a certificate of sale of certain lands. From a judgment in favor of defendant, relatrix appeals. Affirmed.

*Messrs. Wight & Pew*, for Appellant, submitted a brief; *Mr. Chas. E. Pew* argued the cause orally.

*Messrs. Walsh, Nolan & Scallon*, and *Mr. John B. Clayberg*, submitted a brief in behalf of Interveners-Respondents Edgerton *et al.*; *Mr. Wm. Scallon* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Application to the district court of Lewis and Clark county for *mandamus* to compel the defendant, as register of lands for the state of Montana, to issue and deliver to the relatrix a certificate of sale of certain lands described in the affidavit, the same being a portion of the lands granted to the state by the federal government in aid of the common schools, under the Act approved February 22, 1889, commonly called the Enabling Act. It appears from the affidavit that at a sale held by the

defendant on June 27, 1911, under authority conferred upon him by the statute (Sess. Laws 1909, Chap. 147, p. 289), and in conformity with the requirements thereof, the relatrix became the purchaser of the lands in question at the price of ten dollars per acre, paying to the defendant in cash fifteen per cent of the gross price. On July 11, 1911, the sale was approved by the board of land commissioners. The relatrix thereupon became entitled to receive a certificate of purchase. On August 18, 1911, she made demand for the certificate, but the defendant refused to issue it, basing his refusal upon the ground that the sale had been made through inadvertence and mistake, in that one John Edgerton and other persons had acquired a prior interest in the lands and that they were for this reason not subject to sale. After the defendant had filed his answer, Edgerton and his associates were permitted to intervene by answer and set up their alleged rights. Thereafter the controversy was submitted to the court upon an agreed statement of facts. The court held that the relatrix was not entitled to relief and rendered judgment accordingly. The relatrix has appealed.

The agreed statement sets forth in detail the facts upon which the parties base their respective claims. It appears therefrom that there was at the time the application was heard a contest pending before the state contest board, the issue being whether the relatrix has a prior right. Her counsel argue that having become the purchaser at a sale which was in all respects regular, she is entitled to a certificate without regard to any supposed rights Edgerton and his associates may have acquired in the lands prior to her purchase. In other words, upon the completion of the sale and receipt of payment, it is insisted, it became the ministerial duty of defendant to issue the certificate, leaving Edgerton and his associates to have determined, in an appropriate action, any rights which they may have. No appearance has been made in this court by the defendant. Counsel for the interveners argue that under the provisions of the statute *supra*, the authorities of the state, consisting of the board of land commissioners, the contest board and other state officers, are under the statute clothed with exclusive jurisdiction

to try all controversies involving disputed rights to land purchased from the state, and that their proceedings are not, directly or indirectly, subject to control by the courts prior to issuance of patent. Which of these contentions ought to be sustained we shall not undertake to determine. Upon the facts stated the action of the district court in denying the writ was correct.

Section 1 of the Act constitutes the board of land commissioners, consisting of the governor, superintendent of public instruction, secretary of state and attorney general, and vests in it exclusive control and management of all lands belonging to the state. Section 2 designates the governor as president of the board. Section 19 creates a contest board. The register is made the chief officer of this board. Section 43 provides: "Whenever any purchaser of the state lands has paid fifteen per cent of the purchase price of the land bought, and delivered to the register of state lands the bond herein required to be given, the register will make out a certificate of purchase and deliver the same to the purchaser, which certificate shall contain a description of the land purchased, the sum paid, the amount remaining due, the date at which each of the deferred payments falls due, and the amount of each, and shall be signed by the governor, as the president of the state board of land commissioners, and by the register, and a record of the same shall be kept in a suitable book." It will be observed that while this section enjoins upon the register the duty to issue the certificate, it must be signed by the governor as president of the board of land commissioners. If it does not bear the signature of this officer it is not complete, nor is it effective for any purpose. In effect, therefore, the duty enjoined by this section is made the joint duty of the register and the governor as president of the board of land commissioners. Neither can act effectively without the other. Now, it does not appear from the statement of facts or otherwise from the record, that the certificate has been executed, ready for delivery by the register. It is stipulated merely that on August 18, 1911, the relatrix made written demand upon the register for the issuance and delivery of the

certificate and that he then and there refused to issue and deliver it. It does not appear that any demand was ever made upon the governor. The issuance of the writ would therefore not have given the relatrix any effective relief, for though the register were compelled to perform the duty enjoined upon him so far as he might, the governor would be under no compulsion to act with him and would be free to refuse to add his signature. Thus the relatrix would have gained no substantial benefit.

The rule is well settled that when the writ will accomplish no beneficial result it will be denied. (*Gay v. Torrance*, 145 Cal. 144, 78 Pac. 540; *Boyne v. Ryan*, 100 Cal. 265, 34 Pac. 707; *Lamar v. Wilkins*, 28 Ark. 34; *State v. Towers*, 71 Conn. 657, 42 Atl. 1083; *State ex rel. Dixon v. Internal Imp. Fund*, 20 Fla. 402; *Stacy v. Hammond*, 96 Ga. 125, 23 S. E. 77; *People ex rel. Green v. Cook County*, 176 Ill. 576, 52 N. E. 334; *Brownsville Taxing Dist. v. Loague*, 129 U. S. 493, 32 L. Ed. 780, 9 Sup. Ct. Rep. 327; 26 Cyc. 167; *Bailey on Habeas Corpus*, 781.) The same rule applies where the official act to be performed depends upon the act, approval or co-operation of a third person not a party, even though it is clearly the duty of the defendant to act. (*State ex rel. Lacaze v. Cavanac*, 30 La. Ann. 237; *High on Extraordinary Remedies*, 3d ed., sec. 14.)

Nothing said herein is to be understood as a recognition of the right of third parties to intervene in this character of proceeding. The question whether this right is accorded under the statute on this subject will be determined when a case is presented requiring such determination.

The judgment is affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

Rehearing denied September 15, 1913.

## FARWELL, RESPONDENT, v. FARWELL, APPELLANT.

(No. 3,303.)

(Submitted June 10, 1913. Decided June 26, 1913.)

[133 Pac. 958.]

*Divorce—Adultery—Connivance—What Does not Constitute—  
Appeal and Error—Theory of Case—"Willful Desertion"—  
Findings—Conclusiveness—Implied Findings.*

**Appeal and Error—Findings—Request Necessary.**

1. A party who does not request special findings may not on appeal complain of the trial court's failure to make them; in their absence every finding necessary to support the judgment will be implied.

**Divorce—Adultery—Connivance—Proof.**

2. In an action for divorce on the ground of adultery, connivance—corrupt consent on the part of plaintiff to the commission of the act complained of—must be established by clear and convincing proof.

**Same—Adultery—Connivance—What Does not Constitute.**

3. So long as plaintiff in a divorce action was not in any respect responsible for the adulterous act of his wife, the fact that, in order to secure evidence to be used by him on the trial, he laid a trap for her and caught her *flagrante delicto*, was not sufficient to charge him with connivance.

**Same—Findings—Conclusiveness.**

4. Appellant in a divorce proceeding has the burden of showing that the evidence, claimed to be insufficient to support the court's findings, preponderates against them; otherwise they will be deemed conclusive.

**Appeal and Error—Theory of Case.**

5. Where a cause was tried in the district court upon a well-defined theory, alleged errors will be reviewed in the light of such theory.

**Divorce—"Willful Desertion"—Definition.**

6. Willful desertion consists in the voluntary separation of husband or wife from the other, without justification, with intent to desert.

**Same—Desertion—Justification.**

7. Uncontradicted evidence that defendant wife drank to excess, spent nights away from home, visited houses of ill-fame, and committed adultery, showed sufficient justification for plaintiff's act in leaving her without being guilty of willful desertion as defined in paragraph 6 above.

*Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.*

ACTION by Frank E. Farwell against Mabel Farwell for divorce. Judgment for plaintiff. Defendant appeals from the judgment and from an order denying her a new trial. **Affirmed.**

*Messrs. H. A. Tyvand*, and *Mr. E. F. O'Flynn*, for Appellant, submitted a brief; *Mr. Daniel E. Phelan*, of counsel, argued the cause orally.

An action for divorce is an equitable action, and for that reason the complaining party seeking relief must come into court with a "clear conscience and clean hands." The following authorities quoted hold that in case the complaining party is guilty of any offense, a ground for divorce is a recriminative act, and the court should not grant relief: "Divorce is a remedy for the innocent as against the guilty and will not be granted where both the parties are at fault. The defense that the complainant has himself been guilty of misconduct constituting ground for divorce is known as recrimination." (14 Cyc. 648.) "If the plaintiff is guilty of desertion, he is not entitled to a divorce for defendant's adultery." (Keezer on Marriage and Divorce, sec. 253.) "In this state, the statute has specified certain acts or conduct which shall constitute grounds of divorce, and as far as the matrimonial contract is concerned, the courts cannot distinguish between them, whatever difference there may be in a moral point of view. The several offenses must, therefore, be held equally pleadable in bar to the suit for divorce—the one to the other within the principle of recrimination." (*Conant v. Conant*, 10 Cal. 257, 70 Am. Dec. 717.) The Colorado court of appeals, in the case of *Redington v. Redington*, 2 Colo. App. 8, 29 Pac. 811, says: "In the action for divorce brought by the wife against her husband on the ground of desertion, defendant may recriminate with a charge of adultery or any other statutory ground of divorce; and where it appears that each party has been guilty of offense charged, no relief will be granted either." Note that the court says, "adultery or any other statutory ground of divorce" may be set up as a recriminative charge against the plaintiff's ground for divorce. And in this state adultery and desertion are both grounds for divorce. (Rev. Codes, 1907, sec. 3643.) The Colorado court cites the following authorities to support its decision: *Conant v. Conant*, *supra*; *Nagel v. Nagel*, 12 Mo. 53; *Johns v. Johns*, 29 Ga. 718; *Hoff v.*

*Hoff*, 48 Mich. 281, 12 N. W. 161; *Adams v. Adams*, 17 N. J. Eq. 325; *Handy v. Handy*, 124 Mass. 394; *Ribet v. Ribet*, 39 Ala. 348.

The following authorities sustain the proposition that the recriminative act need not be on exactly the same ground as that alleged in the complaint by the plaintiff against the defendant, but any statutory ground may be set up as an absolute defense to defeat a judgment and decree being entered for the plaintiff: *Church v. Church*, 16 R. I. 667, 7 L. R. A. 385, 19 Atl. 244; *Pease v. Pease*, 72 Wis. 136, 39 N. W. 133; *Day v. Day*, 71 Kan. 385, 6 Ann. Cas. 169, 80 Pac. 974; *Stoneburner v. Stoneburner*, 11 Idaho, 603, 83 Pac. 938; *Earle v. Earle*, 43 Or. 293, 72 Pac. 976; *Anderburg v. Anderburg* (Iowa), 91 N. W. 1071; *Johnson v. Johnson* (Tex. Civ.), 23 S. W. 1022; *Stiehr v. Stiehr*, 145 Mich. 297, 108 N. W. 684; *Wass v. Wass*, 41 W. Va. 126, 23 S. E. 537; *Setzer v. Setzer*, 128 N. C. 170, 83 Am. St. Rep. 666, 38 S. E. 731; *Ribet v. Ribet*, 39 Ala. 348; *Hale v. Hale*, 47 Tex. 336, 26 Am. Rep. 294.

*Messrs. Kremer, Sanders & Kremer*, and *Mr. J. A. Poore*, for Respondent, submitted a brief; *Mr. J. Bruce Kremer* argued the cause orally.

If one spouse commits adultery, the other is justified in leaving the matrimonial domicile. (14 Cyc. 634.) "To constitute willful desertion, within the meaning of the statute, the going away and refusal to return by the accused party must be without justifiable cause therefor." (*Stocking v. Stocking*, 76 Minn. 292, 79 N. W. 172, 668; *Luper v. Luper* (Or.), 96 Pac. 1101; *Lyster v. Lyster*, 111 Mass. 327; *Boreing v. Boreing*, 114 Ky. 522, 71 S. W. 431; 14 Cyc. 633; *Kikel v. Kikel*, 25 Neb. 256, 41 N. W. 180.) To prove desertion in the statutory sense as affording a ground for divorce, it is essential to show that the absence of defendant was not justified by the conduct of the plaintiff. (*Hall v. Hall*, 77 Mo. App. 600; *Porritt v. Porritt*, 18 Mich. 420; *Caskey v. Caskey*, 7 Ky. Law Rep. 726; *Hudson v. Hudson*, 59 Fla. 529, 138 Am. St. Rep. 141, 21 Ann. Cas. 278, 29 L. R. A. (n. s.) 614, 51 South. 857.) If the circum-



stances are such as to justify or excuse one spouse in separating from the other, the latter is not entitled to a divorce as for desertion. (14 Cyc. 632; *Cornish v. Cornish*, 23 N. J. Eq. 208.) It is apparent from the foregoing authorities, and from the testimony introduced on behalf of the plaintiff in his case in chief that the evidence did not show that the plaintiff was guilty of desertion, and the motion for a nonsuit or dismissal of the action was properly overruled.

"Connivance in the law of divorce is the complainant's consent, express or implied, to the misconduct alleged as a ground for divorce. A corrupt intention on the part of the complainant that the guilty party shall commit the offense is generally considered an essential element of connivance. If the consent was actually given, the intent is impliedly corrupt and the defense is complete, but where the connivance is claimed as impliedly the result of certain acts or omissions, they must appear to have proceeded from an evil motive." (14 Cyc. 644.) "The husband's failure to protect the wife against temptation will not relieve her from the consequences of her adultery, unless he actively or passively consents thereto." (*Id.* 645.) "And if he suspects her of the offense, he may take measures to secure proof to be used by him in an action for divorce without being guilty of connivance." (*Id.* 646; *Cochran v. Cochran*, 35 Iowa, 477; *Wilson v. Wilson*, 154 Mass. 194, 26 Am. St. Rep. 237, 12 L. R. A. 524, 28 N. E. 167; *Robbins v. Robbins*, 140 Mass. 528, 54 Am. Rep. 488, 5 N. E. 837; *Torlotting v. Torlotting*, 82 Mo. App. 192; *Lee v. Hammond*, 114 Wis. 550, 90 N. W. 1073; *Puth v. Zimbleman*, 99 Iowa, 641, 68 N. W. 895.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to obtain a decree of divorce on the ground of adultery, and for the custody of the minor child, the issue of the marriage. The defendant answered; denied the allegations of the complaint and set forth affirmatively charges against the plaintiff of extreme cruelty, willful neglect, desertion and adultery, and asked for a decree of separate maintenance.

nance and for the custody of the child. The affirmative allegations were put in issue by reply. The trial was had to the court without a jury and resulted in a judgment in favor of the plaintiff. From that judgment and from an order denying her a new trial, the defendant appealed.

1. There is complaint that the trial court failed to make special findings as required by section 6763, Revised Codes, but this complaint is unavailing because appellant failed to request special findings as required by section 6766, Revised Codes. (*Gans & Klein Invt. Co. v. Sanford*, 35 Mont. 295, 88 Pac. 955.) In *Bordeaux v. Bordeaux*, 43 Mont. 102, 115 Pac. 25, this court said: "A party failing to make such request cannot allege error because of the omission to obey the command of the statute. Every finding necessary to support the judgment will then be implied."

2. It is contended that the prayer of plaintiff's complaint [2] should have been denied because of his connivance; but aside from the fact that this defense is not pleaded, there is little, if any, evidence tending to support the charge. "Connivance" is defined by section 3659, Revised Codes, as "the corrupt consent of one party to the commission of the acts of the other, constituting the cause of divorce." It is little less than a crime generally, and may constitute a crime under certain circumstances. The idea that a husband willingly submits to his wife's illicit intercourse is so repulsive and so odious, that the law wisely requires that the consent to adultery must be established by clear and convincing proof. (2 Bishop on Marriage, Divorce and Separation, sec. 223.) The fact that the [3] plaintiff, suspecting his wife of adultery, laid a trap and caught her *flagrante delicto*, thereby securing evidence to be used by him in his divorce proceeding, is not sufficient to charge him with connivance so long as he was not in any respect responsible for her adulterous act. (14 Cyc. 646.)

In *Robbins v. Robbins*, 140 Mass. 528, 54 Am. Rep. 488, 5 N. E. 837, the court said: "There is a manifest distinction between the desire and intent of a husband that his wife, whom he believes to be chaste, should commit adultery, and his desire and

intent to obtain evidence against his wife, whom he believes already to have committed adultery and to persist in her adulterous practices whenever she has opportunity."

In *Wilson v. Wilson*, 154 Mass. 194, 26 Am. St. Rep. 237, 12 L. R. A. 524, 28 N. E. 167, the rule is stated as follows: "Merely suffering, in a single case, a wife, whom he already suspects of having been guilty of adultery, to avail herself to the full extent of an opportunity to indulge her adulterous disposition, which she has arranged without his knowledge, does not constitute a connivance on the part of the husband, even though he hopes he may obtain proof which will entitle him to a divorce, and purposely refrains from warning her for that reason. He may properly watch his wife, whom he suspects of adultery, in order to obtain proof of that fact. \* \* \* The law does not compel a husband to remain always bound to a wife whom he suspects, and it allows him, as it does other parties who think they are being wronged, reasonable scope in their efforts to discover whether the suspected party is or is not guilty, without themselves being adjudged guilty of conniving at the crime which they are seeking to detect." The same doctrine is announced by the Iowa court as follows: "It seems to be well settled that a husband may watch his wife whom he suspects, and may even leave open the opportunities which he finds, so long as he does not make new ones or invite the wrong." (*Puth v. Zimbleman*, 99 Iowa, 641, 68 N. W. 895; see, also, *Lee v. Hammond*, 114 Wis. 550, 90 N. W. 1073.)

3. Upon the recriminatory charges of extreme cruelty and adultery, the evidence is sharply conflicting, consisting in the [4] main of the testimony of the wife in support, and of the husband in denial, of each of these charges. The trial court, having the advantage of seeing the witnesses upon the stand, hearing them testify and observing their demeanor, resolved the questions raised upon these charges in favor of the plaintiff, and with that conclusion we are not justified in interfering. The appellant has the burden of showing that the evidence preponderates against the trial court's findings. (*Reid v. Hennessy Merc. Co.*, 45 Mont. 383, 123 Pac. 397.)

4. With respect to the charges of willful desertion and willful neglect, there is not any substantial conflict in the evidence. For a short time before the commencement of this action plaintiff contributed toward the support of his wife and eight year old son, forty-five or fifty dollars per month; thirty-five dollars per month for a short time, and thirty dollars per month for the remainder of the period during which the parties lived apart. There is also evidence that he paid some doctor bills and probably gave to his wife small sums in addition to the amounts named above. There is not any question of the husband's ability. At the time of the trial he was earning \$200 per month. In the December previous he was earning \$175 per month. What his earnings were during the remainder of the time does not appear. "Willful neglect" is defined in section 3654, Revised Codes, as "the neglect of the husband to provide for his wife the common necessities of life, he having the ability to do so, or it is the failure to do so by reason of idleness, profligacy or dissipation." At first blush it would seem that the amounts paid by this plaintiff to his wife for the support of herself and child were altogether inadequate for that purpose, and out of proportion to his earnings; but it is fairly inferable from the evidence that the amounts were either agreed upon by the parties or fixed by the court in a separate proceeding instituted for the purpose of compelling him to furnish support. In our consideration of this matter we are embarrassed somewhat by the meagerness of facts disclosed and by the attitude of counsel in proceeding upon assumptions not entirely warranted by the record. Apparently the cause was tried upon [5] a well-defined theory, and it is our duty to review alleged errors in the light of that theory so far as it is disclosed. With respect to this particular charge of willful neglect we are simply unable to say from the record before us whether or not it was made out. It was relied upon as an affirmative defense and the burden of proof was upon the defendant. The trial court determined the issue in favor of the plaintiff, and there is not sufficient in the record before us to warrant a reversal of that conclusion.

With respect to the charge of willful desertion, the evidence discloses that while these parties were living in Lincoln, Nebraska, the plaintiff left his wife, notifying her that he did not intend to live with her longer, and came to Montana with the intention that he would not resume the marital relation with her; that the defendant soon afterward followed him to this state, and that they resided in Butte but continued to live separate and apart. Assuming that these facts make out a *prima facie* case of desertion in the absence of any explanation, the question then arises: Has plaintiff brought himself within any well-recognized exception to the general rule which requires the husband to live with his wife and perform the duties imposed by the marital relation. In explanation of his conduct and as excusatory thereof, the plaintiff testified that while they were living together in Lincoln, Nebraska, his wife drank to excess, came home intoxicated, and spent the nights away from home; that he detected her visiting houses of bad repute and that she admitted to him that she was committing adultery. The wife did not deny any of these matters, and the trial court's general finding is a finding that these statements are true. These facts constitute the plaintiff's excuse for his failure to live and cohabit with his wife, and that they are sufficient to warrant him in leaving her, there is not any substantial disagreement in the authorities.

"Willful desertion" is defined by section 3646, Revised Codes, as "the voluntary separation of one of the married parties from the other with intent to desert." The definition implies that the separation is without justification. (14 Cyc. 611; *Luper v. Luper* (Or.), 96 Pac. 1099.) In 1 Bishop on Marriage, Divorce and Separation, section 1742, a general rule is stated as follows: "Where there is no consent, acquiescence or estoppel as just explained, no ills arising out of the marriage, or ill-conduct of one party to the other, will so justify a breaking off of the cohabitation as to prevent its being desertion, except ill-conduct of the sort and degree which the law has made foundation for divorce." In *Stocking v. Stocking*, 76 Minn. 292, 79 N. W. 172, 668, the supreme court of Minnesota criticises the rule an-

nounced by Bishop and says: "On principle, and what seems to be the weight of authority, we hold that the misconduct of one of the parties to the contract of marriage, which will so far justify the injured party in leaving that the separation will not constitute willful desertion, need not necessarily be such as to entitle the injured party to a divorce. It is sufficient if the party withdrawing from the cohabitation has reasonable grounds for believing, and does honestly believe, that by reason of the actual misconduct of the other it cannot be longer continued with health, safety, or self-respect." We are inclined to agree with the Minnesota court; but even if the more rigid rule announced by Bishop should govern, the excuse offered by this plaintiff is sufficient. At the time he left his wife he could have maintained an action against her for divorce for her misconduct, and therefore the separation did not constitute desertion on his part.

There is not any reversible error in the record. The judgment and order are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

**TITUS, RESPONDENT, v. ANACONDA COPPER MIN. CO.,  
APPELLANT.**

(No. 3,281.)

(Submitted May 24, 1913. Decided June 28, 1913.)

[133 Pac. 677.]

*Personal Injuries—Master and Servant—Defective Appliances—  
Complaint—Sufficiency—Assumption of Risk—Contributory  
Negligence—Evidence—Repairs After Injury—Cross-exami-  
nation—Curing Error.*

**Personal Injuries—Complaint—Sufficiency.**

1. Complaint in an action by a stationary engineer to recover damages for injury to his hand while in the discharge of his duties, *held* not open to attack on the ground of being ambiguous and unintelligible, nor on the ground that it appeared therefrom that at the time he was injured he knew of the defect in the machinery which was the cause of the accident.

**Same—Defective Appliances—Repairs After Injury—Evidence—Admissibility.**

2. Evidence of repairs on machinery after an accident was not admissible to show prior negligence, but was properly admitted as throwing light upon its condition when the injury to plaintiff's hand occurred.

**Same—Evidence—Instruction to Disregard—When Improper.**

3. Where evidence was admissible for the purpose stated by counsel for the party introducing it, although inadmissible for another, a request that the court instruct the jury to disregard it entirely was properly refused.

**Same—Cross-examination—Undue Restriction—Curing Error.**

4. Alleged error in unduly restricting cross-examination was cured by the subsequent admission of testimony of the same witness touching the matters involved in such cross-examination.

**Same—Defective Machinery—Vice-principal—Erroneous Information by—Assumption of Risk.**

5. Plaintiff having been informed by defendant's foreman—its vice-principal—that if any defect existed in the stationary engine which he was employed to run, it was the fault of the loose condition of a certain spring, whereas proper investigation would have disclosed that the defect was due to another cause, he had a right to rely upon such information and was not therefore chargeable with assumption of risk in attempting to remedy the supposed defect by tightening the spring, in doing which he was injured.

**Same—Master Ordering Servant into Dangerous Place—Contributory Negligence.**

6. Where a vice-principal stated to an engineer upon going on shift that if the engine missed, the trouble lay in a loose tension spring, the information thus imparted was tantamount to an order to tighten it while the engine was in motion, and the rule applied that where a servant is ordered into a situation of danger by the master, and in obeying the command the former is injured, he is not, as a matter

of law, chargeable with contributory negligence, unless the danger was so glaring that no prudent man would have done the thing even under orders.

*Appeal from District Court, Ravalli County; R. Lee McCullough, Judge.*

ACTION by Ezra D. Titus against the Anaconda Copper Mining Company. From a judgment for plaintiff and from an order denying it a new trial, defendant appeals. Affirmed.

*Messrs. R. A. O'Hara, and Henry C. Stiff, for Appellant, submitted a brief; Mr. Stiff argued the cause orally.*

The complaint is ambiguous, unintelligible and uncertain in that the cause of the injury cannot be determined therefrom, whether it was due to the defective condition of the engine, of which plaintiff alleges full knowledge, or whether it was due to the fact that the foreman or his associate engineer had told him that there was nothing the matter with the engine, except that the spring might be loose. And, if to the latter proposition, it being pleaded that the spring was not loose, no causal connection between the statement that the spring might be a little loose and the injury is made to appear. The complaint, on the whole, does not state a cause of action. The plaintiff, according to the allegations of his complaint, knew of the exact defect that caused his injury and cannot recover. (Bailey on Personal Injuries, 2d ed., 1068.)

The error in admitting this evidence of repairs and changes after the accident becomes apparent from the rule that the mere fact that after the accident the defendant took precaution to prevent a repetition of the same is inadmissible as evidence of negligence at the time, or that the premises or appliances were not in a proper condition. (*Id.* 2096; *Limberg v. Glenwood Lumber Co.*, 127 Cal. 598, 49 L. R. A. 33, 60 Pac. 176.)

Improper limiting of cross-examination of Howley: This witness had been sworn on behalf of the plaintiff, and had testified on direct examination: "I did not know what was the matter with the steel. \* \* \* I didn't know at the time that it was soft steel, that I was working with"—and on cross-exami



nation it was sought to broaden the testimony of the witness regarding the character of the die, the cutting of the same and the character of the engine. (*Kipp v. Silverman*, 25 Mont. 296, 64 Pac. 884.)

The plaintiff assumed the risk. He alleges that he knew of the particular defect causing the injury, and although he notified the defendant of same, no effort was made to repair it, nor was any promise to repair given. This presents a case within the rule laid down in *Coulter v. Union Laundry Co.*, 34 Mont. 590, 87 Pac. 973, where this court cites with approval the language of the supreme court of California in *Limberg v. Glenwood Lumber Co.*, *supra*. (See, also, *Molt v. Northern Pac. Ry. Co.*, 44 Mont. 471, 120 Pac. 809.) It is insufficient for plaintiff to show only an accident and his resulting injury. (*Gleason v. Missouri R. P. Co.*, 42 Mont. 238, 112 Pac. 394, 128 Pac. 586.) And we submit that this is all that plaintiff has proved in this case. .

*Messrs. Baker & Kurtz*, and *Mr. C. S. Wagner*, for Respondent, submitted a brief; *Messrs. E. C. Kurtz and Wagner* argued the cause orally.

**Assumption of risk:** The facts and circumstances in this case, given rational consideration, exculpate respondent from assumption of risk. (See *McAllister v. Rocky Ford Coal Co.*, 45 Mont. 433, 123 Pac. 696; *Toone v. J. P. O'Neill Const. Co.* (Utah), 121 Pac. 10; *Leary v. Anaconda Copper Min. Co.*, 36 Mont. 157, 92 Pac. 477.) When the master mechanic directed respondent to run the engine until morning, when he would fix it, the master mechanic assumed the risk. (*Diehl v. Swett-Davenport Lumber Co.*, 14 Cal. App. 495, 112 Pac. 561; *Forquer v. North*, 42 Mont. 272, 112 Pac. 439; *Allen v. Bell*, 32 Mont. 69, 79 Pac. 582; *Beseloff v. Strandberg*, 62 Wash. 36, 113 Pac. 250; *Carleton Min. & Mill Co. v. Ryan*, 29 Colo. 401, 68 Pac. 279; *Kopacin v. Crown-Col. Pulp & Paper Co.* (Or.), 125 Pac. 281; *McKee v. Tourtelotte*, 167 Mass. 69, 48 L. R. A. 542, and note, 44 N. E. 1071; *Benson v. English Lumber Co.*, 41 Wash. 616, 129 Pac. 403; *Choc-taw, O. & G. R. Co. v. Jones*, 77 Ark. 367, 7 Ann. Cas. 430, 4 L. R. A. (n. s.) 837, 92 S. W. 244.)

Contributory negligence: Ordinarily the question of contributory negligence is a question of fact for the jury, and it is rare indeed that the court may say, as a matter of law, that plaintiff is guilty thereof. Some of the cases cited under the head of assumption of risk, above, discuss the question, and to those cases we again refer. (See, also, *McCabe v. Montana Cent. Ry. Co.*, 30 Mont. 323, 76 Pac. 701.) "Where a master orders a servant into a situation of danger, and in obeying the command he is injured, the law will not charge him with contributory negligence, or with an assumption of risk, unless the danger was so glaring that no prudent man would have encountered it, even under orders of one having authority over him." (*Wurtenberger v. Metropolitan St. Ry. Co.*, 68 Kan. 642, 75 Pac. 1049.) To the same effect see *Kelley v. Fourth of July Min. Co.*, 16 Mont. 484, 41 Pac. 273; *Carleton Min. & Mill Co. v. Ryan*, *supra*.

Under the facts in this case, which disclose that the bracket had been broken and repaired, it became the duty of the master, since he permitted it to remain on the engine, knowing that the bolts which held the broken parts together might work loose, to exercise extra precaution and vigilance to protect its employees from hidden dangers. "The obligation to make an examination for concealed defects is especially strong where an appliance has been injured in parts open to view, and there is strong probability that the same accident may have weakened it in other places." (*Vanyi v. Portland Flouring Mills Co. (Or.)*, 128 Pac. 830.) "Where the servant is injured as the result of an act done by him under an impulse or on belief created by a sudden danger caused solely by the master's negligence, he is not to be regarded as guilty of contributory negligence." (26 Cyc. 1274-g.)

The doctrine of the *Pullen Case* (*Pullen v. City of Butte*, 45 Mont. 46, 121 Pac. 878) appears to be sound in principle and is well supported by authorities from other jurisdictions. "When, in an action for personal injuries, the condition of machinery, appliances, or places for work, as they appeared within a reasonable time after the accident, warrants an inference as to the conditions existing at the time of the accident, such condition may be given in evidence." (26 Cyc. 1427-c; *Kath v. East St. Louis*

*etc. R. R. Co.*, 232 Ill. 126, 83 N. E. 533; *Stoddola v. Cedar Rapids etc. Ry. Co.*, 152 Iowa, 37, 131 N. W. 38; *Boyd v. Taylor*, 207 Mass. 335, 93 N. E. 589; *Landers v. Quincy etc. Ry. Co.*, 156 Mo. App. 580, 137 S. W. 605; *Blevins v. Erwin Cotton Mills Co.*, 150 N. C. 493, 64 S. E. 428; *Missouri etc. Ry. Co. v. Williams*, 103 Tex. 228, 125 S. W. 881; *Gustafson v. A. W. West Lumber Co.*, 51 Wash. 25, 97 Pac. 1094; *Brunger v. Pioneer Roll Paper Co.*, 6 Cal. App. 691, 92 Pac. 1043.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The plaintiff was employed by the defendant company as a stationary engineer, and while in the discharge of his duties was injured. He brought this action to recover damages. In his complaint he describes somewhat minutely certain working parts of the engine, and alleges that a bracket which supported a valve-rod, on the end of which rod was a clutch designed to engage and raise the dash-pot rod, had been broken; that it had been repaired and kept in use until it became loose, rickety, unstable and failed properly to perform its function, with the result that the valve-rod and clutch, no longer kept in place, also failed to perform their duties; that this defect in the bracket was known to the defendant company, or should have been known to it, but that such defect was latent, unknown to the plaintiff and undiscoverable in the exercise of ordinary care while the engine was running; that there was a tension spring attached to the clutch for the purpose of regulating the contact of the clutch with the dash-pot rod; that on August 5, 1908, when plaintiff went to work, he was informed by the defendant's foreman, who was then in charge of the engine, that the machinery was in proper working condition, except, perhaps, that the tension spring was loose; that this information was false and misleading but believed by the plaintiff to be true, and was relied upon by him; that when the clutch failed to attach to the dash-pot rod, he, relying upon the information given him by the foreman, undertook to tighten the spring while the engine was running, with the result that his hand was caught in the machinery and cut and injured, and that

his injury was caused proximately by the broken and defective condition of the bracket. The defendant interposed a demurrer and motion to strike, and, these being overruled, answered denying the allegations of its negligence and pleading contributory negligence and assumption of risk. Upon these affirmative pleas there was issue by reply. The trial of the cause resulted in a verdict for the plaintiff, and from the judgment entered thereon and from an order denying it a new trial, the defendant appealed.

1. We are unable to agree with counsel for appellant in their analysis of the complaint. In the statement above we have fairly [1] epitomized the allegations, and while the pleader might be convicted of prolixity, the essential facts necessary to a statement of the cause of action are not difficult to detect. Terseness of expression is a most refined accomplishment, but it cannot be enforced as a rule of pleading.

Counsel for appellant err in construing an allegation of knowledge at the time the complaint was prepared into an admission of knowledge at the time the injury occurred. A careful reading of the complaint makes clear the plaintiff's meaning.

2. Over the objection of defendant, evidence was introduced [2] of certain things done by the defendant after the accident, in the nature of repairs and replacements. Upon the submission of the cause defendant requested an instruction withdrawing this evidence from the consideration of the jury altogether. The request was denied and error is predicated upon the ruling. It is elementary that evidence of repairs or improvements is not evidence of prior negligence. The plaintiff assumed the burden in this instance of showing (a) that the bracket was out of repair at the time he was injured, and (b) that such condition was due to the defendant's negligence. While evidence of the condition of the bracket on the day following the injury would not tend to prove negligence, it might throw light upon the condition of the bracket when the injury occurred, and for this purpose the evidence was admissible.

In support of their contention that error was committed, counsel for appellant cite *Limberg v. Glenwood Lumber Co.*, 127 Cal. 598, 49 L. R. A. 33, 60 Pac. 176. That case was decided

upon the authority of *Sappenfield v. Main St. etc. Ry. Co.*, 91 Cal. 48, 27 Pac. 590. In each of these cases the court proceeded upon the theory that the only purpose for which the evidence of after-repairs was offered was to prove prior negligence. However, in the later case of *Dow v. Sunset T. & T. Co.*, 157 Cal. 182, 106 Pac. 587, the same court clearly distinguishes between the rule which excludes evidence of after-repairs as proof of prior negligence, and the rule which admits evidence of defective condition after the injury, as tending to prove the like condition at the time of the injury.

In 3 *Bailey on Personal Injuries*, second edition, section 782, page 2101, it is said: "So the fact that a defective appliance was repaired after an accident may be shown upon the question of what was broken, and how, and what was wanting, although improper for the purpose of showing the employer was negligent in not making repairs and alterations before the accident."

When the evidence was offered, counsel for plaintiff announced: "This is for the purpose of showing that the bracket [3] absolutely was unstable and rickety at the time Mr. Titus was hurt. We propose to show the next day that they propped it up with a block of wood." For the purpose indicated the evidence was admissible. (*Pullen v. City of Butte*, 45 Mont. 46, 121 Pac. 878, approving *Dow v. Sunset T. & T. Co.*, above.) Instead of requesting the trial court to charge the jury to disregard the evidence, the defendant should have asked for an instruction limiting the effect of such evidence. Having failed to make a proper request, it cannot complain that the court refused their erroneous instruction.

3. Complaint is made that counsel for defendant were re-  
[4] stricted unduly in their cross-examination of the witness Howley. The record discloses, however, that the same witness was thereafter called by the defendant and testified at length as to the matters involved in his cross-examination while a witness for plaintiff; so that if any error was committed, it was error without prejudice. It is idle for counsel to appeal to this court for a reversal upon a bare *apex juris*.

4. It is urged that this record discloses that in attempting to [5] tighten the spring, plaintiff assumed the risk of injury. If his act had been entirely voluntary, there might be some ground for this contention; but it appears that when plaintiff went on shift he was informed by the foreman, who was then, and had been during the preceding shift, in charge of this engine, that if there was anything the matter with the engine causing it to miss, the fault was in the loose spring. Plaintiff had a right to rely upon this information coming from one whose business it was to know, and he testified that he did so. Under the circumstances as here disclosed the foreman in effect substituted his own judgment for that of the plaintiff, and the defendant company must bear the responsibility for the consequence of the error of its vice-principal due to his negligence in failing to make investigation which would have disclosed the true nature of the trouble. (4 Labatt's Master and Servant, 2d ed., secs. 1373-1375; *Toone v. O'Neel Constr. Co.* (Utah), 121 Pac. 10.) The question of assumption of risk properly went to the jury.

5. Plaintiff's situation was not materially different from what [6] it would have been had the foreman specifically ordered him to attempt to tighten the tension spring with his fingers while the engine was in motion. The evidence is all to the effect that if the trouble had been caused by a loose tension spring, it could have been cured safely by the method adopted by the plaintiff. The real difficulty was with the loose bracket, and because of the engine's vibration, this could not be discovered while the engine was running under a load. Under these circumstances the plaintiff may properly invoke the rule that if the master orders the servant into a situation of danger, and in obeying the command he is injured, the law will not charge him with contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even under orders from one having authority over him." (*Wurtenberger v. Metropolitan St. Ry. Co.*, 68 Kan. 642, 75 Pac. 1049.)

The other alleged errors do not demand separate consideration. The judgment and order are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

# MEMORANDA

OF

DECISIONS RENDERED WITHOUT EXTENDED OPINIONS DURING THE PERIOD EMBRACED IN THIS VOLUME.

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No. 3,289.—WILLIAM RYAN, RESPONDENT, *v.* JAMES HY-  
LENT ET AL., APPELLANTS.

*Appeal from District Court, Sanders County.*

Decided February 10, 1913.

PER CURIAM.—Respondent's motion to dismiss the appeal herein this day submitted to, and taken under advisement by, the court, is hereby sustained and the appeal accordingly dismissed.

*Mr. H. J. Burleigh*, for Appellants.

*Mr. H. S. Ainsworth*, for Respondent.

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No. 3,308.—GEORGE CURRY, APPELLANT, *v.* BARNEY  
McGRADE, RESPONDENT.

*Appeal from District Court, Silver Bow County; J. M. Clements, a Judge of the First Judicial District, presiding.*

MR. JUSTICE HOLLOWAY.—The facts in this case are identical with those in *Curry v. McCaffery*, this day decided (*ante*, p. 191), and upon the authority of that case the judgment is reversed and the cause is remanded for further proceedings.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

*Messrs. Alexander Mackel, Wm. F. Davis, H. A. Tyvand, and I. G. Denny* submitted a brief in behalf of Appellant; *Mr. Davis* argued the cause orally.

*Messrs. John F. Davies, Kremer, Sanders & Kremer, James E. Healy, John V. Dwyer, and William Meyer*, submitted a brief for Respondent; *Mr. J. Bruce Kremer* and *Mr. Healy* argued the cause orally.

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No. 3,309.—GEORGE CURRY, APPELLANT, v. DAN D. DREW,  
RESPONDENT.

*Appeal from District Court, Silver Bow County; J. M. Clements, a Judge of the First Judicial District, presiding.*

MR. JUSTICE HOLLOWAY.—The facts in this case are identical with those in *Curry v. McCaffery*, this day decided (*ante*, p. 191), and upon the authority of that case, the judgment is reversed and the cause is remanded for further proceedings.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

*Messrs. Alexander Mackel, Wm. F. Davis, H. A. Tyvand, and I. G. Denny*, submitted a brief in behalf of Appellant; *Mr. Davis* argued the cause orally.

*Messrs. John F. Davies, Kremer, Sanders & Kremer, James E. Healy, John V. Dwyer, and William Meyer*, submitted a brief for Respondent; *Mr. J. Bruce Kremer* and *Mr. Healy* argued the cause orally.



No. 3,286.—M. M. KLEIN, APPELLANT, *v.* OLAF JENSVOLD,  
RESPONDENT.

*Appeal from District Court, Musselshell County.*

Decided April 7, 1913.

PER CURIAM.—Respondent's motion to dismiss the appeal herein, heretofore submitted, is, after due consideration by the court, granted and the appeal is accordingly dismissed.

*Messrs. Hathhorn & Brown*, for Appellant.

*Mr. W. M. Johnston*, and *Mr. H. J. Coleman*, for Respondent.

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No. 3,298.—JOHN ZIMMERMAN, RESPONDENT, *v.* HELENA  
LIGHT & RAILWAY CO. ET AL., APPELLANTS.

*Appeal from District Court, Lewis & Clark County; J. M. Clements, Judge.*

Decided April 7, 1913.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed in accordance with motion of counsel for appellants.

*Messrs. Wm. Wallace, Jr., John G. Brown*, and *T. B. Weir*, for Appellants.

*Mr. E. A. Carleton*, for Respondent.

No. 3,325.—IN RE MARY FENNER ET AL.

Application for writ of *habeas corpus*.

Decided April 28, 1913.

PER CURIAM.—Complainants' application herein having been heretofore (April 22, 1913) argued and submitted, it is ordered that the writ be denied and the proceeding dismissed.

*Mr. Julius H. Brass*, and *Mr. A. P. Heywood*, for Complainants.

*Mr. H. S. Hepner*, and *Mr. J. A. Walsh*, for Respondent Sister Our Wishes, Sister Superior of the House of Good Shepherd.

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No. 3,338.—MARTHA SULLIVAN, ADMX., RESPONDENT, v.  
CITY OF BUTTE, APPELLANT.

*Appeal from District Court, Silver Bow County.*

Decided May 16, 1913.

PER CURIAM.—Appellant's motion to dismiss the appeal herein is hereby granted and the appeal is accordingly dismissed.

*Messrs. H. L. Maury*, *John A. Smith*, and *N. A. Rotering*, for Appellant.

No. 3,290.—HATTIE M. PETERS, RESPONDENT, v. BARTHOLOMEW A. SCOLLARD, APPELLANT.

*Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.*

Decided June 11, 1913.

PER CURIAM.—It is ordered that the appeal from the judgment herein be, and the same is hereby, dismissed in accordance with stipulation of counsel on file.

*Mr. Geo. Y. Patten, and Mr. V. E. Collins, for Appellant.*

*Messrs. Nolan & Donovan, for Respondent.*



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### AMENDMENTS.

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To statutes, effect on pending proceedings,—see Statutes and Statutory Construction, 5.

### APPEAL AND ERROR.

United States Supreme Court—Decisions—Conclusiveness.

1. The decision of the supreme court of the United States on a federal question is conclusive upon state courts.—*Quong Wing v. Kirkendall*, 16; *Chicago, M. & St. P. Ry. Co. v. Swindlehurst*, 119.

Dismissal of Appeal from Judgment—Effect on Appeal from New Trial Order.

2. The fact that his appeal from the judgment was dismissed on motion of respondent does not deprive the appellant of the right to have his appeal from the order denying his motion for a new trial in the same cause, taken subsequently, heard and determined.—*Murphy v. Nett*, 38.

Instructions—When Appellant may not Complain.

3. Of an instruction in appellant's favor he cannot complain.—*Murphy v. Nett*, 38.

Improper Admission of Evidence—When Appellant may not Complain.

4. Where manifestly improper testimony was elicited in response to five separate interrogatories, none of which was objected to, appellant was not in a position to claim error because of the court's refusal to order it stricken from the record.—*Murphy v. Nett*, 38.

Will Contest—Evidence—Sufficiency.

6. Where in a will contest there was ample evidence to sustain it and substantial evidence against its validity, the decree of the trial court

will not be disturbed on appeal for alleged insufficiency of the evidence to sustain it.—*Murphy v. Nett*, 38.

**New Trial Order—Affirmance, When.**

7. An order granting a new trial asked for on the ground of errors of law occurring at the trial will be affirmed if it appear that any such errors of a substantial character were committed.—*Hulse v. Northern Pacific Ry. Co.*, 59.

**Equity—Findings—Evidence—Sufficiency.**

8. Unless the evidence preponderates against findings claimed to be insufficiently supported by it, they will be accepted on appeal as the established facts in the case.—*Wright v. Brooks*, 99; *Farwell v. Farwell*, 574.

**Nonsuit—Erroneous Reason for Correct Ruling—Affirmance.**

9. An order granting a nonsuit will be affirmed if correct in result, even though the particular reason given for the ruling was erroneous.—*City of Butte v. Goodwin*, 155.

**Verdict on Conflicting Evidence—Conclusiveness.**

10. A verdict attacked on the ground of insufficiency of the evidence to sustain it will not be disturbed on appeal where the evidence is conflicting and where the court, after consideration of a motion for new trial, stamped the finding of the jury with its approval by denying the motion.—*Previsich v. Butte El. Ry. Co.*, 170.

**Rulings on Evidence—Error—Brief—Duty of Appellant.**

11. Counsel alleging error in rulings on evidence sought to be elicited on cross-examination must in his brief point out wherein they were prejudicial to the substantial rights of his client, charged with crime, it not being incumbent upon the supreme court, in the absence of such assistance, to make a critical examination of them in an effort to ascertain whether they in fact wrought prejudice.—*State v. Tudor*, 185.

**Oral Instructions—Absence of Objection—Record—Review.**

12. Where, in a criminal cause, the only showing in the record on appeal that the instructions had been delivered orally instead of in writing as required by section 9271, Revised Codes, was the heading to the charge: "Oral Instructions of the Court to the Jury," and in the absence of any objection and exception to the alleged erroneous course pursued by the trial court, the assignment of error in counsel's brief in this respect *held* not to merit consideration.—*State v. Tudor*, 185.

**Election Contests—Record on Appeal—Sufficiency.**

13. While section 7248, Revised Codes, confers the right of appeal on either party to an election contest, no provision is made for a record by which the appeal can be presented to the supreme court. Contestant in such a proceeding filed a record appropriate in an ordinary civil action. Mode of procedure *held* proper, under section 6329, which provides that where the course of procedure in any matter of which a court has jurisdiction is not specifically pointed out by the Code or statutes, any suitable process most conformable to the spirit of the Code may be adopted.—*Curry v. McCaffery*, 191.

**Specification of Errors—Briefs—Disregard of Rule—Penalty.**

14. A specification of errors made up of a mass of random narrative, unnumbered rulings of the trial court, explanatory statements and argumentative matter, in disregard of subdivision b, section 3, of Rule X of the supreme court, relative to what appellant's brief shall contain, lays the appeal open to dismissal.—*Blaustein v. Pincus*, 202.

**New Trial Order—Review—Presumptions.**

15. Plaintiff's notice of intention to move for a new trial specified seven grounds, among them insufficiency of the evidence and that the verdict was against law, and stated that the motion would be based, *inter alia*, upon the minutes of the court. While the record on appeal disclosed the methods pursued in presenting the other grounds, it was silent as to the course pursued in relation to the two mentioned above, both of which are properly reviewable upon the minutes. *Held*, that it being the duty of appellant to show error in the court in granting the motion, and no error having been made apparent in other respects, it will be presumed that the order, so far as relates to the two grounds specified *supra*, was based upon the minutes.—*Moore v. Butte Electric Ry. Co.*, 214.

**De Minimis Doctrine—New Trial.**

16. Under the maxim "*De minimis non curat lex*," a new trial will not be ordered, even though the cause was tried upon an erroneous theory of the law applicable, where, with the exception of \$2.38, the claims of the plaintiff were offset by those of the defendant.—*Mantle v. White*, 234.

**Theory of Case—Conclusiveness.**

17. The theory upon which a case was tried in the district court with the acquiescence of the parties is binding upon them on appeal; hence, the court may not be put in error for any action during its course, even though such theory was wholly erroneous, unless timely objection was made thereto.—*Raiche v. Morrison*, 127; *Wallace v. Weaver*, 437.

**Same—Equity—Instructions.**

18. Where appellant acquiesced in the trial of a cause as a suit in equity, he was bound on appeal by the theory thus adopted, and was therefore not in position to complain of alleged error in giving or refusing instructions to the jury.—*Moss v. Goodhart*, 257.

**Equity—Evidence—Erroneous Admission—Presumptions.**

19. On appeal in an equity suit, the presumption obtains that the district court in arriving at its decision disregarded any erroneously admitted evidence, unless it appears that it influenced the decision in some material aspect.—*Moss v. Goodhart*, 257.

**Evidence—Complaint—Insufficiency—When Treated as Amended.**

20. Where evidence is admitted, without objection, in aid of a fact necessary to state a cause of action but not alleged in the complaint, the pleading will, after judgment, be treated as amended to admit such proof.—*Moss v. Goodhart*, 257.

**Offer of Proof—Failure to Make—Effect.**

21. Where an offer of proof was not made and the probable answer of the witness was not apparent, alleged error in sustaining an objection to a question is not reviewable.—*Taylor v. Malta Mercantile Co.*, 342.

**Evidence—Exclusion—Curing Error.**

22. Error in the exclusion of offered testimony is cured by the subsequent admission of substantially the same evidence.—*Taylor v. Malta Mercantile Co.*, 342.

**New Trial—Record—Insufficiency.**

23. An alleged irregularity said to have prevented appellant from having a fair trial, not shown by the record to have been called to the attention of the court, although the notice of intention to move for a new trial specified irregularity in the proceedings as one of the grounds, will not be reviewed on appeal.—*Melzner, Admr., v. Raven Copper Co.*, 351.

**Instructions—Refusal—Review—Record—Insufficiency.**

24. Where the record, though giving the settlement of certain instructions, failed to set out the instructions as read to the jury, refusal to give one offered by appellant will not be reviewed.—*Melzner, Admr., v. Raven Copper Co.*, 351.

**Instructions—Theory of Case—Binding on Appeal.**

25. Defendant city having acquiesced in the giving of an instruction that as contributory negligence not been pleaded or shown by the evidence of either party, plaintiff must be assumed to have used the street in a proper manner and without negligence, was bound by the theory of the case thus adopted, and was not in position to urge a reversal of the judgment on the alleged ground that the evidence showed contributory negligence on plaintiff's part.—*Nilson v. City of Kalispell*, 416.

**Evidence—Contributory Negligence—Appeal.**

26. In the absence of anything indicating such an inherent improbability in the evidence of plaintiff as to deny it credibility, and in view of the verdict of the jury in his favor and the action of the trial court in passing upon defendant's motion for a new trial, the supreme court will not say that plaintiff should not have recovered because he was shown to have been negligent as a matter of law.—*Nilson v. City of Kalispell*, 416.

**Technicalities.**

27. In the disposition of appeals the supreme court will be controlled by considerations of substance and not mere technicality.—*State v. Whitworth*, 425.

**Recovery of Nominal Damages—New Trial.**

28. A judgment should not be reversed and a new trial granted for the sole purpose of enabling appellant to recover nominal damages, unless he is substantially prejudiced by a failure to award such damages, as where the judgment carries costs.—*Wallace v. Weaver*, 437.

**Justices of the Peace—Default Judgment—Order Setting Aside—Not Appealable.**

29. An appeal does not lie from an order of a justice of the peace sustaining a motion to set aside a default judgment, open the default and permit an answer to be filed, or from any order; the only appeal permitted from such a court being from a judgment.—*Burch v. Roberson*, 456.

**Questions not Reviewable on Appeal from New Trial Order.**

30. The sufficiency of the complaint not having been challenged by objection to the introduction of evidence, or otherwise, and a ruling of the court obtained thereon during trial, the question is not reviewable on appeal from an order denying a new trial, but may be examined only on appeal from the judgment.—*O'Rourke v. Grand Opera House Co.*, 459.

**Slander—Excessive Damages—Discretion—Review.**

31. The amount of damages awarded in an action for slander is a matter peculiarly within the discretion of the jury after taking into consideration all the circumstances appearing from the evidence, and its verdict (\$1,000 in this instance), claimed to be excessive, should not be disturbed unless the sum awarded is so large as to raise a presumption that it was the result of a gross error or of undue motives.—*Downs v. Cassidy*, 417.

**Same.**

32. Unless, after making due allowance for the superior position occupied by a district judge in the trial of a cause, the supreme court is compelled to the conclusion that he abused his discretion in refusing a



new trial asked for on the ground of excessive damages, his action will be affirmed.—*Downs v. Cassidy*, 417.

**Injunction Order—Record—Bill of Exceptions.**

33. The copies of papers constituting the record on appeal from an order (refusing to issue an injunction *pendente lite*) must be identified as copies of the papers used at the hearing in the district court, by a bill of exceptions, settled in a certificate of the judge; a certificate by the clerk to the effect that they are correct copies being insufficient. *Latimer v. Nelson*, 545.

**Theory of Case.**

34. Where a cause was tried in the district court upon a well-defined theory, alleged errors will be reviewed in the light of such theory.—*Farwell v. Farwell*, 574.

**Implied Findings.**

35. A party who does not request special findings may not on appeal complain of the trial court's failure to make them; every finding necessary to support the judgment will be implied.—*Farwell v. Farwell*, 574.

**Cross-examination—Undue Restriction—Curing Error.**

36. Alleged error in unduly restricting cross-examination was cured by the subsequent admission of testimony of the same witness touching the matters involved in such cross-examination.—*Titus v. Anaconda Copper Min. Co.*, 583.

**ATTORNEYS.**

**Misconduct—What Does not Constitute.**

1. Evidence of defendant's financial condition having been a proper matter of inquiry in an action for slander, the remark of counsel for plaintiff in his opening statement that defendant would be shown to be a person of wealth may not be said to have been such misconduct as to warrant the granting of a new trial, even though no evidence whatever touching the subject was later offered by him.—*Downs v. Cassidy*, 471.

**AUTOMOBILES.**

See *Personal Injuries*, 40, 41.

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## BURDEN OF PROOF.

Jurisdictional facts, where allegation that judgment had been “duly given and made” is controverted,—see Pleading and Practice, 13.

Negligence—Instructions—Proper Refusal.

1. The burden was on plaintiff to prove that his injury was the result of defendant's failure to exercise such precautions as the case required, including omission to warn him of the dangerous proximity of telegraph poles, by contact with one of which he was brushed from the footboard of a street-car; hence an instruction requested by defendant company which in effect would have cast such burden upon it was properly refused.—*Previsich v. Butte El. Ry. Co.*, 170.

## CANCELLATION.

See Contracts, 14, 22.

## CARRIER AND PASSENGER.

See, also, Street Railroads.

Crowded Street-cars—Passenger Standing on Footboard not Contributory Negligence *Per Se*.

1. It is not contributory negligence *per se* for a person to ride upon a crowded car or upon the platform or footboard thereof; therefore an instruction that if plaintiff knew that the car on the footboard of which he was riding was crowded when he got on, he assumed the risk of being struck by telegraph poles erected alongside the track, even though he knew nothing of their proximity to the track, was properly refused; whether a passenger under such circumstances should be held to have assumed the hazard of his position is generally a question of fact for the jury, and not one of law for the court.—*Previsich v. Butte El. Ry. Co.*, 170.

## CAUSES OF ACTION.

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Boards of County Commissioners—Jurisdiction.

1. *Certiorari* lies to review the actions of boards of county commissioners with reference to the creation of new counties.—*State ex rel. Jacobson v. Board*, 531.

## CITIES AND TOWNS.

See, also, Personal Injuries, 32–38.

Illegal discharge of police officer, action for damages by,—see *Mandamus*; Police Officers.

Police Power—Extent and Exercise.

1. The extent of the police power of a municipality must be ascertained from the law creating it, and the laws of the state upon the subject; it cannot be surrendered, alienated, abridged or enlarged by contract, nor delegated even though the legislature give its consent.—*Helena etc. Ry. Co. v. City of Helena*, 18.

**Same—Street Railroads—Regulation—Statutory Construction—Lighting of Tracks.**

2. *Held*, under the rule of statutory interpretation, applicable alike to an ordinance, that where general words follow particular and specific ones, the former must be construed to mean things of the same kind, that a provision in an ordinance granting a franchise to a street railway company reserving in the city the right to "adopt such other and further regulations, rules," etc., as the council might see fit to impose, had reference to and included only regulations treated of and particularized in preceding sections, *vis.*, police regulations, and therefore did not embrace, in the absence of a specific agreement to that effect, the power to compel the company to light its tracks within the corporate limits without cost to the city—a matter not included within the purview of the term "police regulations."—*Helena etc. Ry. Co. v. City of Helena*, 18.

**Powers—How to be Determined and When to be Denied.**

3. A municipality has only such powers as are expressly conferred by the law creating it, and such as are necessarily implied and indispensable in order to accomplish the purpose of its creation; and when there is a fair and reasonable doubt as to the existence of the particular power, it must be resolved against the municipality and the power denied.—*Helena etc. Ry. Co. v. City of Helena*, 18.

**Same—Street Railroads—Lighting Tracks—Invalid Ordinance.**

4. *Held*, that subdivision 12 of section 3259, Revised Codes, granting city or town councils power to compel "the lighting of any railroad track \* \* \* within a city or town, the cars of which are propelled by steam or otherwise," etc., at the expense of the owner, has no application to street railroads, and that, therefore, an ordinance requiring a street railway company to light its tracks within the corporate limits without expense to the city was void.—*Helena etc. Ry. Co. v. City of Helena*, 18.

**Contracts—Disregard of Statutory Requirements—Invalidity.**

5. Under the limitation—exclusive and not directory in its nature—upon the power of cities to let contracts prescribed by section 3278, Revised Codes, to the effect that all contracts requiring the expenditure of a sum in excess of \$250 must be let to the lowest responsible bidder, a contract entered into by a city with a street railway company, under the terms of which the latter was to be paid the cost of removing and replacing its tracks on certain streets to enable the former to lay sewers, amounting to over \$5,500, was void.—*Missoula Street Ry. Co. v. City of Missoula*, 85.

**Same—Estoppel—Inapplicability of Doctrine.**

6. Plaintiff railway company, having been cognizant of the limitation placed by law upon the power of defendant city in the letting of contracts, was not in a position to claim recovery of the reasonable cost of the work performed by it in taking up and relaying its tracks as shown in paragraph 5, *supra*, under the doctrine of equitable estoppel applicable to dealings between natural persons and private corporations. *Missoula Street Ry. Co. v. City of Missoula*, 85.

**City Treasurer—Public Funds—Interest on Deposits—Who Entitled Thereto.**

7. A city treasurer is, as to the public funds in his hands, a trustee for the benefit of the city, and must account for and pay over any profits derived from their use.—*City of Butte v. Goodwin*, 155.

**Same—Failure to Pay Over Interest—Statute of Limitations.**

8. Subdivision 1 of section 6449, barring an action upon a liability created by statute if not brought within two years, *held*, not to apply to an action against a city treasurer to recover interest received by him

on deposits of city funds which he failed to turn over to his principal. *City of Butte v. Goodwin*, 155.

**Same—Statute of Limitations.**

9. A city treasurer who failed to turn over interest received on public funds was guilty of a breach of his implied promise, as trustee of such funds, to do so, and not of a breach of a contract in writing—his official bond; hence an action to recover such interest, brought more than four years after the conclusion of the treasurer's term of office, was barred under subdivision 3 of section 6447, Revised Codes.—*City of Butte v. Goodwin*, 155.

**Same—Official Bond—Nature of Undertaking.**

10. The official bond of the city treasurer is not a contract in the strict sense of that term, but rather a collateral security for the faithful performance of official duty.—*City of Butte v. Goodwin*, 155.

**New Counties—County Seat—Unincorporated Towns—Eligibility.**

12. *Held*, that an unincorporated town was eligible to become a candidate for county seat of a county proposed to be created under Chapter 112, Laws of 1911.—*State ex rel. Powers v. Dale*, 227.

**Officers—Failure to Take Oath—Vacancies.**

13. The failure of the person elected or appointed to a city office to qualify within ten days (by taking the official oath), creates a vacancy under section 3234, Revised Codes, which may be filled by the appointing power.—*State ex rel. Bennetts v. Duncan*, 447.

**Council—Vacancies—How Filled—Statutes.**

14. *Held*, that the provision of section 3236, Revised Codes, requiring "a majority vote of the members" of the city council—i. e., a majority of those constituting the actual membership of the body at the time—to fill a vacancy in an elective city office, and not section 3263, making "a majority of the whole number of the members elected" requisite for such purpose, is applicable in case a vacancy in its own body caused by resignation or death is to be filled.—*State ex rel. Wilson v. Willis*, 548.

**Same—Rights of Member Elected to Fill Vacancy.**

15. Having been rightfully chosen by the city council to fill a vacancy in its own body, and after taking and subscribing the constitutional oath, an alderman had the right to have his vote on the question of filling another vacancy, caused by death, recorded, even though a certificate of election had not been issued to him, and irrespective of the mayor's refusal to recognize him or of the fact that an action to determine his official status was then pending.—*State ex rel. Wilson v. Willis*, 548.

**Same—Official Oath—Duty to File—Records—*Mandamus*.**

16. The official oath of an alderman being required to be subscribed must be in writing, and is intended to become a record of the city; and since under section 3253, Revised Codes, the city clerk must keep all records, papers, etc., of the city, he may be compelled by *mandamus* to file such oath, as well as record the vote of such alderman upon the question of filling a vacancy in the council, his vote constituting part of its proceedings at the meeting at which the vacancy was filled, of which record must be made.—*State ex rel. Wilson v. Willis*, 548.

**CITY COUNCIL.**

**Vacancy in, how filled,—see Cities and Towns, 14.**

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**CONCLUSIONS.**

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**CONSTITUTION.**

Foreign Corporations—License Fees—Taxing Interstate Commerce—Due Process of Law—Statutes—Invalidity.

1. *Held*, that section 165, Revised Codes, which provides that for filing copies of charters or articles of incorporation of foreign corporations the secretary of state shall exact the same fee as domestic corporations are required to pay,—a fixed number of cents per \$1,000 of the par value of the entire capital stock,—is void in so far as it affects a corporation engaged in interstate commerce, organized under the laws of a sister state, which seeks to do business in this state, in that it imposes a tax upon interstate commerce, is an imposition upon the corporation's property beyond the limits of the state, and therefore constitutes a taking thereof, without due process of law, to the amount of the fee sought to be collected.—Chicago, Milwaukee & St. Paul Ry. Co. v. Swindlehurst, 119.

County Printing—Constitutionality of Statute—Due Process of Law.

2. *Held*, that section 2897, Revised Codes, providing that county printing must be done within the state, is not repugnant to either the Fifth or Fourteenth Amendment to the Constitution of the United States, relative to deprivation of property without due process of law, or to section 3, Article III, Montana Constitution, having to do with the inalienable right of acquiring property.—Hersey v. Neilson, 132.

Same.

3. In the absence of a showing that in its operation section 2897, Revised Codes, imposes upon the taxpayers a burden greater than they would have to bear if outside competition were permitted, and thus indirectly operates as a tax upon the inhabitants of counties, contrary to section 4, Article XII, of the Constitution, its constitutionality in that regard will not be determined.—Hersey v. Neilson, 132.

Same—Statute—Local or Special Laws.

4. Since section 2897, Revised Codes, requiring county printing to be done within the state, applies to all counties and to all county printing contracts, it is neither a local nor a special statute, and therefore does not do violence to section 26, Article V, of the state Constitution prohibiting the enactment of either.—Hersey v. Neilson, 132.

## Same—Regulation of Interstate Commerce.

5. Section 2897, Revised Codes, making it incumbent upon counties to have their public printing done within the state, *held*, not a regulation of interstate commerce contrary to the clause in section 8 of Article I of the federal Constitution.—*Hersey v. Neilson*, 132.

## Corporations—Annual Report—Statutes—Constitutionality.

6. Chapter 140, Laws 1909, *held* not unconstitutional as casting "liabilities and burdens upon domestic corporations from which foreign corporations are exempt," the penalty for failure to file the annual report being placed upon the officers and directors and not upon the corporation.—*Daily v. Marshall*, 377.

## Same—Fines—Penal Statutes.

7. A fine within the meaning of section 20, Article III of the Constitution, which declares that excessive fines, *etc.*, shall not be inflicted, is a penalty exacted by the state for a criminal offense; therefore, such provision has not any application to the penalty imposed upon directors of a corporation for neglect to file the annual statement required by section 3850, Revised Codes, as amended. (Chap. 140, Laws 1909.)—*Daily v. Marshall*, 377.

## CONSTITUTION OF MONTANA.

## (List of Sections Cited or Commented upon.)

Article III, section 3	146
Article III, section 6	483
Article III, section 20	398
Article III, section 23	372
Article V, section 26	147
Article VIII, section 1	229
Article VIII, section 12	195
Article XII, section 4	144, 146
Article XIII, section 4	141
Article XV, section 11	397
Article XV, section 12	230
Article XVI, section 6	141

## CONTINUANCES.

See District Courts, 4, 5; Elections, 4.

## CONTRACTS.

See, also, Specific Performance.

County Printing,—see Counties, 3-8.

Municipal Contracts,—see Cities and Towns, 5.

## Sales—Oral—Real Property—Statute of Frauds—Evidence—Admissibility.

1. Where plaintiff sought to recover money on a demand loan, defendant was properly allowed to introduce testimony tending to show that the money paid him by the former was not a loan, but a partial payment upon the purchase price of real property sold under an oral contract, even though such contract of purchase was invalid, and therefore unenforceable, under the statute of frauds.—*Perkins v. Allnut*, 13.

## Breach by Purchaser—Part Payments—Recovery Back.

2. A purchaser of real property under an oral agreement, who has made a partial payment on the purchase price and then voluntarily terminates the agreement, cannot recover back such payment in the absence of a showing that defendant is unable or unwilling to carry out the contract.—*Perkins v. Allnut*, 13.

**Capacity to Make—Test.**

3. While contractual capacity implies, *prima facie*, capacity to make a will, neither is a test for the other, and the presence or absence of one does not conclusively establish the presence or absence of the other. *Murphy v. Nett*, 38.

**Options—Definition and Requisites.**

4. An option, in legal effect, is a continuing offer to sell, convertible into a contract by acceptance within the time stated; therefore, to constitute a particular instrument an option, the terms of the offer must be such that, when accepted, the offer and acceptance will make a binding contract.—*Monahan v. Allen*, 75.

**Same—Real Property—Incomplete Contract—Effect.**

5. *Held*, under the rule above, that an offer to sell certain real property for a named price, the terms of payment to be "\$5,000 cash at the time of the signing of deeds of conveyance and the remainder to be paid on the terms and under such agreements as may hereafter be made," alleged by plaintiff to have been accepted by him "upon the terms set out in said option," was too vague, indefinite and uncertain to form a basis for a contract.—*Monahan v. Allen*, 75.

**Real Property—Possession Under Contract of Sale—Nature of Holding.**

6. One possessing land under a contract of sale holds, not adversely, but in subordination to, the legal title.—*Wright v. Brooks*, 99.

**Performance—Sufficiency of Pleading.**

7. Under section 6572, Revised Codes, performance by plaintiff of his contract was sufficiently alleged by his statement that "defendant (inadvertently substituted for "plaintiff") actually completed all of the work and labor to be by him performed under said contract and did all of the things in said contract of him required to be done."—*Ivanhoff v. Teale*, 115.

**Options—Effect of Acceptance.**

8. An option, whether based upon a consideration or not, ripens into a binding contract if accepted during its life by the promisee.—*Raiche v. Morrison*, 127.

**Breach—Plaintiff Entitled to Nominal Damages, When.**

9. Proof of the breach of a contract is proof of a wrong for which the injured party is entitled to recover nominal damages.—*Raiche v. Morrison*, 127.

**Official Bond—Not Contract.**

10. An official bond is not a contract in the strict sense of that term, but rather a collateral security for the faithful performance of official duty.—*City of Butte v. Goodwin*, 155.

**Sales—Breach by Buyer—Advance Payments—Forfeiture.**

11. In the absence of an equitable showing, a defaulting purchaser of property is not entitled to a return of any advance payments made by him, even though there is no provision in the contract of sale for liquidated damages in case of default.—*Cook-Reynolds Co. v. Chipman*, 289.

**Same—Time of Essence of Contract—Applicability of Principle—Tender.**

12. Whether time is or is not of the essence of a contract of sale is material to the application of the rule stated in paragraph 11, *supra*, only where the defaulting party has, after expiration of the time limit, made a tender, with a refusal of acceptance by the seller; hence where no such tender was made but the buyer expressly pleaded his inability to meet his obligations, the question of time became immaterial.—*Cook-Reynolds Co. v. Chipman*, 289.

**Same—Forfeitures—Tender—Statute—Applicability.**

13. Where, under a contract of sale of property (real and personal), cancellation of which, with forfeiture of an advance payment, was

sought because of breach by the vendee in failing to make a deferred payment, the legal title remained in the vendor though possession was delivered to the vendee, section 5800, Revised Codes, providing for a vendor's lien, has no application, and therefore the provision of section 5715, declaring void, "contracts for the forfeiture of property subject to a lien," etc., held not to have any pertinency.—Cook-Reynolds Co. v. Chipman, 289.

**Same—Rescission—Cancellation—Placing Defendant in *Statu Quo*—Inapplicability of Principle.**

14. Held, that the rule requiring the vendor, who comes into a court of equity seeking the rescission of a contract of sale, to return to the vendee all moneys paid on the purchase price in excess of an amount sufficient to compensate plaintiff in damages, has no necessary application in an action upon the contract to cancel it for a breach by the vendee.—Cook-Reynolds Co. v. Chipman, 289.

**Same—Forfeiture—Relief from—Evidence.**

15. Evidence held to show that defendant vendee's breach of duty, under a contract of sale of land and personalty, in failing to meet a deferred payment on the due date was not so grossly negligent, willful or fraudulent, as to deny him relief under section 6039, Revised Codes, from forfeiture of an advance payment of \$5,000 as provided in the contract, where it appeared that the value of the property had not diminished during defendant's occupancy, that the value of its use was much less than the advance payment made by him, and that damages by way of compensation could easily be arrived at.—Cook-Reynolds Co. v. Chipman, 289.

**Same—Forfeiture—Erroneous Decree—Interest.**

16. A cause of action to recover unpaid interest on a note (with attorney's fees for collecting same), the principal of which was erroneously decreed forfeited to plaintiff, falls with the forfeiture.—Cook-Reynolds Co. v. Chipman, 289.

**Same—Personal Property—Breach of Contract—Nominal Damages—Nonsuit—Error.**

17. Where defendant in an action for the breach of a contract of sale of livestock might, under conflicting evidence, have been entitled to at least nominal damages on a counterclaim interposed by him, it was error to direct a nonsuit as to such counterclaim.—Clifton v. Willson, 305.

**Same—Advance Payments—Forfeitures—Recovery Back—Prerequisites.**

18. One who, after making part payments on a contract of sale of personalty, refuses to complete the transaction, the seller being ready and willing to fulfill its stipulations, cannot recover them back, unless he can bring himself within the exception provided by section 6039, Revised Codes, by alleging and proving facts and circumstances upon which, in equity and good conscience, he should have relief from the forfeiture, and which excuse him from the imputation of gross negligence, or willful or fraudulent breach of duty.—Clifton v. Willson, 305.

**Same—Liquidated Damages—Pleading and Proof.**

19. Under section 5054, Revised Codes, every contract which provides for liquidated damages on a breach thereof, is *prima facie* void as to such stipulation; therefore, a party seeking recovery upon the contract must allege and prove that it falls within the exception provided in section 5055.—Clifton v. Willson, 305.

**Same—Instructions—Invasion of Province of Jury.**

20. Where the evidence was in conflict as to which of the parties to a contract of sale of livestock, for the breach of which plaintiff



sought recovery in an action in which defendant interposed a counterclaim, was in default, the court erred in charging the jury in effect that defendant was.—Clifton v. Willson, 305.

**Same—Refusal to Accept Delivery—Resale—Effect on Advance Payments.**

21. After the buyer of livestock had refused to accept delivery of the animals, and renounced the contract of sale, he was not in a position to insist that the seller was bound to refrain from reselling them at the peril of incurring the obligation to refund advance payments made by him under the contract.—Clifton v. Willson, 305.

**Of Sale—Breach by Vendee—Cancellation—Rescission.**

22. An action seeking the enforcement of the provision of a contract of sale of real and personal property that failure on the part of the buyer to meet any deferred payment of the purchase price on the date mentioned therein should work an immediate forfeiture of the contract was not one to rescind, and therefore the rules prescribed by section 5065, Revised Codes, touching rescission, were inapplicable.—Fratt v. Daniels-Jones Co., 487.

**Same—Advance Payments—Forfeiture—Equity.**

23. In the absence of such a showing by a defaulting purchaser as will appeal to the conscience of a court of equity, he is not entitled to a return of any payment he may have made on the purchase price.—Fratt v. Daniels-Jones Co., 487.

**Same—Time of Essence of —Validity.**

24. Neither the provision making time of the essence of a contract of sale, nor the contract containing such a provision, is invalid as against positive law or public policy.—Fratt v. Daniels-Jones Co., 487.

**Same—Courts will Enforce Contracts as Made.**

25. Courts will not undertake to make contracts for parties, different from those which the parties themselves intended, but will enforce a provision making time of the essence of a contract, unless the party for whose benefit it was inserted has waived it or is estopped to insist upon its enforcement, or performance has been prevented by intervening circumstances sufficient to relieve the party from the performance of any other provision of the contract.—Fratt v. Daniels-Jones Co., 487.

**Same—Deferred Payments—Notice of Due Date—Laches.**

26. Under a contract of sale by the terms of which failure to pay an installment of the purchase price ends the contract, time being expressly declared of the essence of it, notice that an installment has fallen due is not required, and therefore a claim that plaintiff was guilty of laches because of delay in giving it had no merit.—Fratt v. Daniels-Jones Co., 487.

**Same.**

27. Where a contract of sale provides that the vendor shall have the right to declare it at an end, upon failure by the vendee to make payment on a date fixed, time being expressly made of the essence of the contract, breach by the vendee does not *ipso facto* terminate the agreement, but an election is necessary on the part of the vendor requiring some sort of notice on his part to make the provision effective.—Fratt v. Daniels-Jones Co., 487.

**Same—Return of Part Payment—Insufficient Showing.**

28. Under the rule declared in paragraph 23 above, *held*, that the showing made by defendant corporation to the effect that its officers were so engrossed with other business that they forgot that a payment was due on a contract of sale, was insufficient to entitle it to relief (Rev.

Codes, sec. 6039) from the forfeiture of an advance payment.—*Fratt v. Daniels-Jones Co.*, 487.

### CONTRIBUTORY NEGLIGENCE.

See Personal Injuries.

### CORPORATIONS.

(Other than Municipal.)

#### Action by Minority Stockholders—Nature of Action.

1. A suit brought by seven stockholders for themselves and a large number of others, not named, similarly situated, to set aside a sheriff's sale and enjoin the issuance of a deed thereunder, was one brought in behalf of the corporation, and not one to subserve the private, personal interests of plaintiffs.—*Brandt v. McIntosh*, 70.

#### Duty of Stockholders Before Bringing Action—Complaint—Insufficiency.

2. Before stockholders may have recourse to a court of equity for redress of their grievances as to corporate affairs, they must first exhaust their remedy within the corporation itself; hence the complaint mentioned in paragraph 1 above was insufficient for failing to allege that plaintiffs were minority stockholders; that a demand had been made upon and refusal by the board of directors, or why a demand would have been useless.—*Brandt v. McIntosh*, 70.

Same.

3. An allegation of demand upon the president and secretary (directors) of a corporation for redress of grievances of minority stockholders is insufficient in the absence of a statement showing the number constituting the board of directors.—*Brandt v. McIntosh*, 70.

Same.

4. The complaint referred to in the foregoing paragraphs was deficient, also, in that while alleging wrongdoing by the officers of the corporation in neglecting to effect a redemption of its property sold at the sheriff's sale sought to be vacated, it omitted to aver that the officers had funds, or the means of obtaining them, with which to do so.—*Brandt v. McIntosh*, 70.

#### Foreign—Filing of Articles—License Fees—Constitution—Taxing Interstate Commerce—Due Process of Law.

5. *Held*, that section 165, Revised Codes, which provides that for filing copies of charters or articles of incorporation of foreign corporations the secretary of state shall exact the same fee as domestic corporations are required to pay,—a fixed number of cents per \$1,000 of the par value of the entire capital stock,—is void in so far as it affects a corporation engaged in interstate commerce, organized under the laws of a sister state, which seeks to do business in this state, in that it imposes a tax upon interstate commerce, is an imposition upon the corporation's property beyond the limits of the state, and therefore constitutes a taking thereof, without due process of law, to the amount of the fee sought to be collected.—*Chicago, Milwaukee & St. Paul Ry. Co. v. Swindlehurst*, 119.

#### National Banks—Receivers—Stockholder's Action—Demand—Complaint.

6. The rule that to entitle a stockholder to prosecute an action for redress of an injury to the corporation, as distinguished from one which he himself has suffered, he must allege that he has made demand upon the corporate authorities (or the receiver in charge) to act or make it apparent that a demand upon them (or him) would have been useless, is applicable to national banks; in case

of such a corporation he must allege demand upon the board of directors, the receiver or the controller of the currency.—*Moss v. Goodhart*, 257.

**Directors—Annual Reports—Failure to Make—Complaint.**

7. One who seeks to hold directors of a corporation liable for failure to comply with the provisions of section 3850, Revised Codes, as amended (Laws 1909, Chap. 140), relative to filing the annual report therein specified, must allege facts and circumstances clearly showing that the liability has attached, nothing being presumed in favor of the pleader.—*Daily v. Marshall*, 377.

**Same—Complaint—Sufficiency—Construction—Implication.**

8. Since, under section 3833, Revised Codes, a corporation for profit must have a capital stock, an allegation that a concern was organized and operated for profit implies that in order to have any legal existence it must have had a capital stock; hence, under the rule that whatever is necessarily implied or reasonably to be inferred from an allegation in a pleading is to be taken as directly averred, the allegation, in an action of the character referred to in paragraph 7, *supra*, was sufficient as against the objection that it did not directly aver that the corporation had a capital stock.—*Daily v. Marshall*, 377.

**Same—Statutes—Failure to Observe—Dissolution—Collateral Attack.**

9. After a corporation has come into existence as provided by section 3825, Revised Codes, failure to observe the requirements prescribed by section 3829 *et seq.*, relative to the adoption of by-laws, the election of directors and officers, *etc.*, though rendering the corporate franchise and privileges subject to forfeiture under section 3892, by affirmative action by the state, does not *ipso facto* work a dissolution of it or lay its corporate capacity open to attack collaterally by a private citizen in a controversy between him and the corporation.—*Daily v. Marshall*, 377.

**Same—Duties of Directors—Estoppel.**

10. A corporation cannot, after having been engaged in business apparently in good faith, avoid liabilities incurred under the corporate name, on the ground that its directors had not, in the conduct of its private affairs, observed the forms of law in perfecting its organization and that therefore it had ceased to exist as a corporation; nor can a director thereof, whether properly chosen or not, after taking an active part in the conduct of its business, deny its corporate being on such ground in order to escape personal liability under section 3850, for failure to file the annual report therein required.—*Daily v. Marshall*, 377.

**Same—Statutes—Constitutionality.**

11. Section 3850, Rev. Codes, *held*, not unconstitutional as casting "liabilities and burdens upon domestic corporations from which foreign corporations are exempt," the penalty for failure to file the annual report being placed upon the officers and directors and not upon the corporation.—*Daily v. Marshall*, 377.

**Same—Statutes—Strict Construction.**

12. Section 3850, Rev. Codes, is penal only in the sense that it creates a liability not known to the common law, and therefore must be strictly construed.—*Daily v. Marshall*, 377.

**Same—Constitution—Penal Statutes.**

13. A fine within the meaning of section 20, Article III of the Constitution, which declares that excessive fines, *etc.*, shall not be inflicted, is a penalty exacted by the state for a criminal offense;

therefore, such provision has not any application to the penalty imposed upon directors of a corporation for neglect to file the annual statement required by section 3850, Revised Codes, as amended.—Daily v. Marshall, 377.

**Same—Documentary Evidence—Admissibility.**

14. Papers signed by defendant as director which tended to show that his corporation had been engaged in doing business as such and that he and his associates had acted in the capacity of directors, were properly admitted in evidence as showing use of the corporate franchise.—Daily v. Marshall, 377.

**Corporate Existence—Question for Court, When.**

15. The question whether a corporation was in existence *de jure* or *de facto* was one of law for the court, where the evidence did not present a disputed question of fact.—Daily v. Marshall, 377.

**Board of Directors—Special Meetings—Verbal Notice—Sufficiency.**

16. Verbal notice of a special meeting of the board of trustees of a corporation organized under the Compiled Statutes of 1887 was sufficient to make its proceedings proof against the objection that they were void because not based upon a written notice.—O'Rourke, Executrix, v. Grand Opera House Co., 459.

**Same—Special Meetings—Written Notice—When Unnecessary.**

17. Notice in writing to the members of the board of directors of a corporation of the holding of a special meeting, as required by section 449, Civil Code of 1895 (Rev. Codes, sec. 3848), was not indispensable to the legality of the proceedings, where all the directors attended and participated without objection in the dispatch of the business in hand.—O'Rourke, Executrix, v. Grand Opera House Co., 459.

**Directors—Sale of Stock—Effect.**

18. Upon the assumption that the sale of his stock in a corporation *ipso facto* vacated the office of the seller as a director, such result did not follow where at the time of a special meeting of the board negotiations for the sale, though pending, were not completed.—O'Rourke, Executrix, v. Grand Opera House Co., 459.

**Same—Directors—Advances to Corporation—Repayment.**

19. A director may advance money to his corporation for the payment of legal expenses, charges for taxes, insurance, etc., and enforce his claim for repayment, provided he act in good faith and do not obtain an advantage to the detriment of the other stockholders.—O'Rourke, Executrix, v. Grand Opera House Co., 459.

**Same—Advances—Allowance of Claim—Preference.**

20. That a director of a corporation, by the action of the board of directors in allowing a claim of the former for repayment of advancements made by him, gained a preference over other of its creditors was not a matter of concern to the corporation, but one to be adjusted between the creditors themselves.—O'Rourke, Executrix, v. Grand Opera House Co., 459.

**Insolvency—Rights of Creditors.**

21. The fact that a corporation is insolvent does not affect the right of one of its creditors, whether one of its officers or a stranger, to reduce his claim to judgment.—O'Rourke, Executrix, v. Grand Opera House Co., 459.

COUNTIES.

**Not Municipal Corporations.**

1. Held, that only incorporated cities and towns are municipal corporations in this state, and that therefore counties may not be classed as such.—Hersey v. Neilson, 132.

**Definition—Legislative Control.**

2. Counties are political subdivisions of the state for governmental purposes; as such they are subject to legislative power, except in so far as it is restricted by the Constitution in express terms or by necessary implication.—*Hersey v. Neilson*, 132.

**Printing Contracts—Limit of Powers.**

3. Under section 2870, Revised Codes, a county has only such powers as are expressly conferred by law or necessarily implied from those expressed; hence a board of commissioners—its executive body—whose authority to let a public printing contract is questioned, must justify its action by reference to the provisions of law defining and limiting its powers in this respect.—*Hersey v. Neilson*, 132.

**Same—Manner of Letting.**

4. The manner in which county printing contracts shall be let is one of legislative or governmental policy, with which courts may not interfere.—*Hersey v. Neilson*, 132.

**Same—Constitutionality of Statute—Due Process of Law.**

5. *Held*, that section 2897, Revised Codes, providing that county printing must be done within the state, is not repugnant to either the Fifth or Fourteenth Amendment to the Constitution of the United States, relative to deprivation of property without due process of law, or to section 3, Article III, Montana Constitution, having to do with the inalienable right of acquiring property.—*Hersey v. Neilson*, 132.

**Same—Statutes—Constitutionality—Record.**

6. In the absence of a showing that in its operation section 2897, Revised Codes, imposes upon the taxpayers a burden greater than they would have to bear if outside competition were permitted, and thus indirectly operates as a tax upon the inhabitants of counties, contrary to section 4, Article XII, of the Constitution, its constitutionality in that regard will not be determined.—*Hersey v. Neilson*, 132.

**Same—Statute—Local or Special Laws—Constitution.**

7. Since section 2897, Revised Codes, requiring county printing to be done within the state, applies to all counties and to all county printing contracts, it is neither a local nor a special statute, and therefore does not do violence to section 26, Article V, of the state Constitution prohibiting the enactment of either.—*Hersey v. Neilson*, 132.

**Same—Constitution—Regulation of Interstate Commerce.**

8. Section 2897, Revised Codes, making it incumbent upon counties to have their public printing done within the state, *held*, not a regulation of interstate commerce contrary to the clause in section 8 of Article I of the federal Constitution.—*Hersey v. Neilson*, 132.

**New Counties—County Seat—Unincorporated Towns—Eligibility.**

9. *Held*, that an unincorporated town was eligible to become a candidate for county seat of a county proposed to be created under Chapter 112, Laws of 1911.—*State ex rel. Powers v. Dale*, 227.

**Same—County Commissioners—Excess of Jurisdiction—*Certiorari*.**

10. *Certiorari* lies to review the actions of boards of county commissioners taken with reference to the creation of new counties, they being required, in such proceedings, to act as quasi-judicial tribunals within the meaning of section 7203, Revised Codes, which provides that the writ may go when a board exercising judicial functions has exceeded its jurisdiction and there is no appeal or any plain, speedy and adequate remedy.—*State ex rel. Jacobson v. Board*, 531.

**Same—Exclusion and Inclusion of Territory—County Commissioners—Limit of Power.**

11. Chapter 112, Laws of 1911, did not, and Chapter 133, Laws of 1913, amendatory of the former Act, does not empower a board of county commissioners to incorporate territory within the boundaries of a proposed new county which is not included in the petition praying for its creation, or to exclude territory unless a proper petition for withdrawal thereof is presented.—*State ex rel. Jacobson v. Board*, 531.

**Same—Statutes—Effect of Amendments on Pending Proceedings—Case at Bar.**

12. Proceedings for the creation of a new county were instituted under Chapter 112, Laws of 1911, and petitions containing the necessary recitals presented to the proper board of county commissioners. One of the essentials to favorable action by the board under Chapter 112 was that the county proposed to be created had property of the assessed valuation of \$4,000,000. Proclamation calling for an election was not made until after Chapter 112 had been amended by Laws of 1913 (Chapter 133, p. 484). Chapter 133 amended the original Act (Chapter 112) by authorizing the creation of a new county if it possessed assessable property to the amount of \$3,000,000—thus changing the very basis of the proceedings and the jurisdiction of the board. *Held*, on *certiorari*, that in assuming to complete the proceedings under the Act of 1913, the board's action was without jurisdiction and void.—*State ex rel. Jacobson v. Board*, 531.

#### COURTS.

See United States Supreme Court; Supreme Court; District Courts; Justices of the Peace.

#### CREDITORS.

See, also, Fraudulent Conveyances, 1-3.

May reduce claims against insolvent corporation to judgment,—see Corporations, 21.

#### CRIMINAL LAW.

**Gaming—Information—Surplusage.**

1. *Held*, under section 8416, Revised Codes, which makes gaming carried on or conducted by one as "principal, agent or employee" a crime, that an information charging defendant with a violation of said section "as owner and proprietor" of the game was not defective, the words last quoted being surplusage, neither restricting nor enlarging the meaning of the information.—*State v. Tudor*, 185.

**Same—Information—Demurrer—Waiver of Objection.**

2. A demurrer to an information on the general ground that the facts therein were not stated in ordinary and concise language in such manner as to enable a person of common understanding to know what was intended, was equivalent to a waiver of the objection, in the absence of a distinct specification of the particular ground thereof, as required by section 9201, Revised Codes.—*State v. Tudor*, 185.

**Same—Rulings on Evidence—Error—Brief—Duty of Appellant.**

3. Counsel alleging error in rulings on evidence sought to be elicited on cross-examination, must in his brief point out wherein they were prejudicial to the substantial rights of his client, charged with crime, it not being incumbent upon the supreme court, in the absence of such assistance, to make a critical examination of them in an effort to ascertain whether they in fact wrought prejudice.—*State v. Tudor*, 185.

**Same—Detectives—Evidence—Cross-examination—Exclusion of Evidence—Harmless Error.**

4. Where, though technical error was committed in the exclusion of testimony sought to be elicited by defendant from detectives on cross-examination, substantially all the pertinent facts relative to their character and credibility—the only purpose for which the evidence was material—were brought to the knowledge of the jury, the action of the court *held* nonprejudicial.—State v. Tudor, 185.

**Same—Detectives—Evidence—Competency.**

5. Testimony of detectives who acted as decoys and took part in a gambling game for the unlawful carrying on of which defendant was on trial, *held* competent.—State v. Tudor, 185.

**Same—Instructions—To be Given in Writing.**

6. In the absence of a waiver by the parties to a criminal prosecution, the instructions to the jury must, under section 9271, Revised Codes, be delivered in writing.—State v. Tudor, 185.

**Same—Oral Instructions—Absence of Objection—Record—Review.**

7. Where, in a criminal cause, the only showing in the record on appeal that the instructions had been delivered orally instead of in writing as required by section 9271, Revised Codes, was the heading to the charge: "Oral Instructions of the Court to the Jury," and in the absence of any objection and exception to the alleged erroneous course pursued by the trial court, the assignment of error in counsel's brief in this respect *held* not to merit consideration.—State v. Tudor, 185.

**Appeal and Error—Technicalities.**

8. Under the rule that in the disposition of appeals the supreme court will be controlled by considerations of substance and not mere technicality, only assignments of error in a criminal cause by which some substantial right of appellant appears to have been erroneously and prejudicially affected will be reviewed.—State v. Whitworth, 424.

**Homicide—Self-defense—Cross-examination.**

9. In a prosecution for homicide which accused sought to justify under a plea of self-defense, cross-examination of a brother of deceased, relative to a conversation had with him by one of the state's witnesses, bearing upon the truth of the latter's account of a meeting between defendant and deceased a few days before the killing, and touching the attitude of himself and deceased as one of hostility to appellant prior to and at the time of the affray as well as his own animus as a witness, *held* to have been improperly excluded.—State v. Whitworth, 424.

**Same—Threats—Admissibility in Evidence.**

10. Evidence of threats by deceased, directed to but made out of the presence of defendant, was relevant and improperly excluded, where there was a controversy as to who was the aggressor, as to whether there was on the part of deceased an overt act or demonstration sufficient to induce a reasonable fear in the defendant for his personal safety, and as to whether he killed the deceased under the influence of such fear alone.—State v. Whitworth, 424.

**Same.**

11. The fact that prior threats were vague, indefinite and conditional upon catching the person against whom they were directed in doing a certain act was no bar to their admissibility, even though the condition did not happen.—State v. Whitworth, 424.

#### CROSS-EXAMINATION.

See Evidence, 8, 13; Criminal Law, 4, 9.

Undue restriction, error cured by subsequent admission of same evidence,—see Evidence, 29.

## CUSTOM.

Evidence of, in derogation of statute, inadmissible,—see Evidence, 14.

## DAMAGES.

Evidence of past profits, admissibility,—see Evidence, 10.

Excessive,—see Verdicts.

Contracts—Breach—Plaintiff Entitled to Nominal Damages, When.

1. Proof of the breach of a contract is proof of a wrong for which the injured party is entitled to recover nominal damages.—*Raiche v. Morrison*, 127.

Special Damages—Pleading.

2. Special damages due to defendant's withholding property sought to be regained by the seller because of breach of contract by the former, not having been specially pleaded, were improperly awarded. *Cook-Reynolds Co. v. Chipman*, 289.

Sale—Personal Property—Breach of Contract—Nominal Damages—Nonsuit Error.

3. Where defendant in an action for the breach of a contract of sale of livestock might, under conflicting evidence, have been entitled to at least nominal damages on a counterclaim interposed by him, it was error to direct a nonsuit as to such counterclaim.—*Clifton v. Willson*, 305.

Same—Liquidated Damages—Pleading and Proof.

4. Under section 5054, Revised Codes, every contract which provides for liquidated damages on a breach thereof is *prima facie* void as to such stipulation; therefore, a party seeking recovery upon the contract must allege and prove that it falls within the exception provided in section 5055.—*Clifton v. Willson*, 305.

*Mandamus*—Action for Damages.

5. *Mandamus*, though a remedy civil in its nature, is not a civil action in the sense that the parties to such a proceeding and their privies are, on principles of *res adjudicata*, barred by the judgment from thereafter maintaining an action for damages flowing from the wrong which gave rise to the proceeding in *mandamus*.—*Bailey v. Edwards*, 363.

Same—Damages Recoverable.

6. The damages allowable in a *mandamus* proceeding are such as are incidental to the proceeding itself, and not those arising out of the transaction which the writ was invoked to redress.—*Bailey v. Edwards*, 363.

Water Rights—Violation of Decree—Nominal Damages.

7. Though the violation of a water right decree may give rise to a proceeding in contempt, it is not sufficient to constitute a cause of action, even for nominal damages, since one to whom such a right is decreed neither owns the water nor the channel of the stream out of which it is taken, but merely has the right to use the water when it is needed, and therefore the rule that in a case of trespass upon real property, strictly speaking, the plaintiff has a right of action for nominal damages at least, has not any application.—*Wallace v. Weaver*, 437.

Recovery of Nominal Damages—New Trial.

8. A judgment should not be reversed and a new trial granted for the sole purpose of enabling appellant to recover nominal damages, unless he is substantially prejudiced by a failure to award such damages, as where the judgment carries costs.—*Wallace v. Weaver*, 437.



DECLARATIONS.

See Evidence, 4, 6, 7, 20, 21, 22.

DEFAULT JUDGMENTS.

Order of justice of the peace setting aside, not appealable,—see Justices of the Peace, 2.

DEMAND.

By stockholder against corporation for relief before bringing action,—see Pleading and Practice, 21.

DE MINIMIS DOCTRINE.

See Appeal and Error, 16.

DETECTIVES.

Admissibility of evidence of,—see Criminal Law, 4, 5.

DISCRETION.

Admissibility of declarations,—see Evidence, 21.

Granting postponement of trial,—see District Courts, 7.

Refusal of new trial on ground of excessive damages,—see Appeal and Error, 31, 32.

Permission to amend pleadings,—see Pleading and Practice, 33, 39, 40.

DISMISSAL.

Of appeal from judgment—effect on appeal from new trial order,—see Appeal and Error, 2.

Of election contest on ground of delay, when error,—see Elections, 5.

DISTRICT COURTS.

Judges—Disqualification—Power of Court to Call Other Judges.

1. A district judge who deems himself disqualified in a matter pending in his court may call one trial judge after another until he can secure the services of one able to preside at the trial of the cause.—Curry v. McCaffery, 191.

Same—Disqualification—Manner of Calling in Other Judges.

2. Unless the disqualification of a trial judge to preside in a cause pending before him is brought about by the filing of the affidavit mentioned in section 6315, Revised Codes, as amended (Laws 1909, p. 161), he is not required to first call upon the other judge or judges of his own district before he can invite a judge of another district to act in his stead.—Curry v. McCaffery, 191.

Jurisdiction.

3. Where the jurisdiction of a court is exclusive and has once lawfully attached, it cannot be ousted by subsequent events or facts arising in the cause; jurisdiction remains in it until final judgment, unless divested thereof through constitutional provision.—Curry v. McCaffery, 191.

Continuances.

4. A court of record has authority of its own motion and in the absence of statute, to adjourn the hearing of a matter pending before it. Curry v. McCaffery, 191.

**Election Contests—Continuances—Jurisdiction.**

5. *Held*, that the district court erred in dismissing an election contest on the ground that it lost jurisdiction because of an adjournment taken by it on its own motion (before actual commencement of trial) for a period of time exceeding twenty days from the day originally set for the hearing; the statute (sec. 7244, Rev. Codes) not containing any restriction upon the power of the court relative to the subject of continuances, other than that neither party shall have a continuance, before commencement of trial, for more than twenty days, and that after commencement of trial adjournment shall be had from day to day only.—*Curry v. McCaffery*, 191.

**Same—Limit of Special Term or Session.**

6. *Held*, that the special session or term of the district court authorized by section 7241, Revised Codes, to be held for the determination of an election contest, is not limited to twenty days, or to any period of time, by either Constitution or statute.—*Curry v. McCaffery*, 191.

**Postponement of Trial—Discretion.**

7. In the absence of an affirmative showing that refusal to postpone the trial of a cause on the alleged ground of surprise on account of an amendment made to the complaint at its commencement, worked prejudice to appellant, the exercise of the discretion lodged in the court in the premises is not subject to review.—*Downs v. Cassidy*, 471.

**DIVORCE.****Adultery—Connivance—Proof.**

1. In an action for divorce on the ground of adultery, connivance—corrupt consent on the part of plaintiff to the commission of the act complained of—must be established by clear and convincing proof.—*Farwell v. Farwell*, 574.

**Same—Connivance—What Does not Constitute.**

2. So long as plaintiff in a divorce action was not in any respect responsible for the adulterous act of his wife, the fact that in order to secure evidence to be used by him on the trial, he laid a trap for her and caught her *flagrante delicto*, was not sufficient to charge him with connivance.—*Farwell v. Farwell*, 574.

**“Willful Desertion”—Definition.**

3. Willful desertion consists in the voluntary separation of husband or wife from the other, without justification, with intent to desert.—*Farwell v. Farwell*, 574.

**Desertion—Justification.**

4. Uncontradicted evidence that defendant wife drank to excess, spent nights away from home, visited houses of ill-fame, and committed adultery, showed sufficient justification for plaintiff's act in leaving her without being guilty of willful desertion as defined in paragraph 3 above.—*Farwell v. Farwell*, 574.

**DOMESTIC RELATIONS.**

See Divorce.

**DUE PROCESS OF LAW.**

Statute relative to county printing held not unconstitutional as against due process of law clause,—see Counties, 5.

Taking property without,—see Corporations, 5.

**EIGHT-HOUR LAW.**

Violation of, by employer and employee,—effect on right to recover damages,—see Personal Injuries, 2.

## ELECTIONS.

**Contests—Record on Appeal—Sufficiency.**

1. While section 7248, Revised Codes, confers the right of appeal on either party to an election contest, no provision is made for a record by which the appeal can be presented to the supreme court. Contestant in such a proceeding filed a record appropriate in an ordinary civil action. Mode of procedure *held* proper, under section 6329, which provides that where the course of procedure in any matter of which a court has jurisdiction is not specifically pointed out by the Code or statutes, any suitable process most conformable to the spirit of the Code may be adopted.—Curry v. McCaffery, 191.

**Same—Statements—Verification—Sufficiency.**

2. A verification attached to the statement of contest of an election in form substantially the same as that required for a pleading in a civil action was sufficient.—Curry v. McCaffery, 191.

**Same—Limit of Special Term of Session.**

3. *Held*, that the special session or term of the district court authorized by section 7241, Revised Codes, to be held for the determination of an election contest, is not limited to twenty days, or to any period of time, by either Constitution or statute.—Curry v. McCaffery, 191.

**Same—Continuances—District Courts—Jurisdiction.**

4. *Held*, that the district court erred in dismissing an election contest on the ground that it lost jurisdiction because of an adjournment taken by it on its own motion (before actual commencement of trial) for a period of time exceeding twenty days from the day originally set for the hearing; the statute (sec. 7244, Rev. Codes) not containing any restriction upon the power of the court relative to the subject of continuances, other than that neither party shall have a continuance, before commencement of trial, for more than twenty days, and that after commencement of trial adjournment shall be had from day to day only. Curry v. McCaffery, 191.

**Same—Trial—Delay—Jurisdiction—Erroneous Dismissal.**

5. Where an election contest had been instituted within twenty days after the canvassers made their return (Rev. Codes, sec. 7238), the jurisdiction thus obtained of it was not ousted by neglect of the district judge to "thereupon order a special session or term of such court" on a day to be named by him (sec. 7241), or by error committed in failing to convene court "at the time and place designated" (sec. 7244), such latter sections being not mandatory but directory only.—Stephens v. Nacey, 479.

**Same—Trial—Delay—Nonaction by Contestant—Effect.**

6. Mere nonaction on the part of contestant after filing his statement of contest could not be construed as an abandonment of it so as to warrant dismissal for want of prosecution, where the district judge, though failing in the performance of his duty in the premises, did not refuse to call a special term of court, but, on the contrary, assured his counsel that he would do so.—Stephens v. Nacey, 479.

**Same—Statement of Contest—Conclusions.**

7. An allegation in the statement of contest that contestee's name was not rightfully on the official ballot was not only a bare conclusion of the pleader, but did not, under section 7234, Revised Codes, constitute a ground of contest.—Stephens v. Nacey, 479.

**Same—Statement of Contest—Insufficiency—Irregularities—Prejudice.**

8. Alleged misconduct on the part of election judges in omitting to certify to the number and names of the persons who voted, and the names of candidates and the number of votes received by each, constituted an irregularity which, in the absence of facts from which it might be inferred that contestee suffered prejudice, was insufficient

to warrant rejection of the vote cast at the particular polling-place.—*Stephens v. Nacey*, 479.

**Same—Statement of Contest—Fraud—Sufficiency.**

9. An allegation in a statement of contest that the election judges were guilty of malconduct in "that they pretended and represented and returned" to the board of canvassers that a certain number of votes had been cast for contestee at a particular polling-place, "whereas in truth and in fact" no votes had been cast for him at such place, if intended to charge fraud on the part of the election judges, *held*, to state a cause of action, though perhaps open to special demurrer.—*Stephens v. Nacey*, 479.

**Same—Statement of Contest—Sufficiency.**

10. The allegation that contestee received a certain number of votes at a polling-place cast by persons who at the time were not residents of the state "but lived upon and within an Indian reservation, in said county, and were not in any respect qualified electors," *held* to state a ground of contest.—*Stephens v. Nacey*, 479.

### EQUITY.

See, also, Findings; Instructions, 4-6.

**Sales—Breach by Buyer—Advance Payments—Forfeitures.**

1. In the absence of an equitable showing, a defaulting purchaser is not entitled to a return of any advance payments made by him.—*Perkins v. Allnut*, 13; *Cook-Reynolds Co. v. Chipman*, 289; *Clifton v. Willson*, 305.

**Subrogation—Nature of Remedy.**

2. The doctrine of subrogation is invoked by courts of equity to the end that justice may be done as nearly as possible, its application depending upon the circumstances of each particular case.—*American Bonding Co. v. State Savings Bank*, 332.

**Equities Balanced—Status of Party Holding Legal Title.**

3. Where the equities of the parties are evenly balanced, the position of the one who has the legal title to the thing in controversy is the better.—*American Bonding Co. v. State Savings Bank*, 332.

**Evidence—Erroneous Admission—Presumptions.**

4. On appeal in an equity suit, the presumption obtains that the district court in arriving at its decision disregarded any erroneously admitted evidence, unless it appears that it influenced the decision in some material aspect.—*Moss v. Goodhart*, 257.

### ESTATES OF DECEASED PERSONS.

See Executors and Administrators; Wills.

### ESTOPPEL.

**Equitable Estoppel—Inapplicability of Doctrine.**

1. Plaintiff street railway company having been cognizant of the limitation placed by law upon the power of defendant city in the letting of contracts, was not in a position to claim recovery of the reasonable cost of the work performed by it in taking up and relaying its tracks, to enable the city to lay a sewer, under the doctrine of equitable estoppel applicable to dealings between natural persons and private corporations.—*Missoula Street Ry. Co. v. City of Missoula*, 85.

**Pleading—Evidence.**

2. Where plaintiff specifically denied allegations in the answer, he may not on appeal rely upon them to supplement his own insufficient showing.—*Mantle v. White*, 234.

**Corporations—Duties of Directors.**

3. A corporation cannot, after having been engaged in business apparently in good faith, avoid liabilities incurred under the corporate

name, on the ground that its directors had not, in the conduct of its private affairs, observed the forms of law in perfecting its organization and that therefore it had ceased to exist as a corporation; nor can a director thereof, whether properly chosen or not, after taking an active part in the conduct of its business, deny its corporate being on such ground in order to escape personal liability under section 3850, Rev. Codes, for failure to file the annual report therein required.—*Daily v. Marshall*, 377.

EVICTIION.

See Landlord and Tenant.

EVIDENCE.

See, also, Criminal Law, 4, 5, 9, 10, 11.

Admissibility of parol evidence to ascertain extent of decree in water right suit,—see Water and Water Rights, 3.

Real Property—Sale—Oral Contracts—Statute of Frauds.

1. Where plaintiff sought to recover money on a demand loan, defendant was properly allowed to introduce testimony tending to show that the money paid him by the former was not a loan, but a partial payment upon the purchase price of real property sold under an oral contract, even though such contract of purchase was invalid, and therefore unenforceable, under the statute of frauds.—*Perkins v. Allnut*, 13.

Wills—Injustice of—Admissibility in Evidence—For What Purpose.

2. Under the rule that, though the injustice or unreasonableness of a will is not alone sufficient to cause its rejection, it is a circumstance bearing upon the questions of testamentary capacity and undue influence, the facts that the testator's mother (contestant) had transferred all her real and personal property to him and that he knew this before he made his will, naming a sister his sole beneficiary, were properly admitted in evidence.—*Murphy v. Nett*, 38.

Improper Admission of Evidence—When Appellant may not Complain.

3. Where manifestly improper testimony was elicited in response to five separate interrogatories, none of which was objected to, appellant was not in a position to claim error because of the court's refusal to order it stricken from the record.—*Murphy v. Nett*, 38.

Wills—Declarations of One of Several Beneficiaries—When Admissible.

4. The rule that where there are two or more beneficiaries under a will having a common or several, but not joint, interest in its provisions, the declarations of one of them as to testamentary capacity or undue influence are inadmissible to affect its validity, has no application in a case where the only real beneficiary to be adversely affected by such declarations was declarant (proponent of the instrument), the others, to each of whom was left one dollar, having been beneficiaries in name only.—*Murphy v. Nett*, 38.

Same—Insanity—Invading Province of Jury—Expert Testimony—When not Objectionable.

5. Where the validity of a will was attacked on the ground that at the time of its execution testator was insane,—contestee asserting that he then had a lucid interval, and contestant maintaining that his ailment did not permit of lucid intervals, the evidence showing that shortly before and soon after the date of the instrument he was shown to have been of unsound mind, dying ultimately of dementia,—rebuttal testimony by insanity experts that in their opinion testator could not have had a lucid interval at the time in question, *held*, not objectionable as invading the province of the jury.—*Murphy v. Nett*, 38.

Personal Injuries—Railroads—Trespassers—Self-serving Declarations—Inadmissibility.

6. Self-serving declarations of plaintiff in an action for personal injuries sustained in being run over by a freight train on which he

was riding without paying fare, to the effect that he had been pushed off by a brakeman, *held*, not part of the *res gestae* but mere narratives of a past transaction, and therefore properly excluded.—*Hulse v. Northern Pac. Ry. Co.*, 59.

**Same—Self-serving Declarations—Rebuttal—Admissibility.**

7. Defendant's witnesses having testified to a remark made by plaintiff soon after the accident, to the effect that someone had pushed him off the car, but that he did not say that a brakeman had done so, rebuttal testimony that he had made the latter statement was improperly excluded; it was admissible under section 7871, Revised Codes, even though the declaration thus made by him was self-serving.—*Hulse v. Northern Pac. Ry. Co.*, 59.

**Detectives—Cross-examination—Exclusion of Evidence—Harmless Error.**

8. Where, though technical error was committed in the exclusion of testimony sought to be elicited by defendant from detectives on cross-examination, substantially all the pertinent facts relative to their character and credibility—the only purpose for which the evidence was material—were brought to the knowledge of the jury, the action of the court *held* nonprejudicial.—*State v. Tudor*, 185.

**Same—Evidence—Competency.**

9. Testimony of detectives who acted as decoys and took part in a gambling game for the unlawful carrying on of which defendant was on trial, *held* competent.—*State v. Tudor*, 185.

**Damages—Past Profits—Admissibility.**

10. Evidence of profits which plaintiff had actually realized during his occupancy of the premises prior to the acts of defendant which culminated in the former's eviction, objected to as incompetent, speculative and remote, was properly admitted in proof of damages sustained by plaintiff.—*Blaustein v. Pincus*, 202.

**Equity—Erroneous Admission—Presumptions.**

11. On appeal in an equity case the presumption obtains that the trial court, in arriving at its decision, disregarded any erroneously admitted evidence, unless it appears that it influenced the decision in a material aspect.—*Moss v. Goodhart*, 257.

**Complaint—Insufficiency—When Treated as Amended.**

12. Where evidence is admitted, without objection, in aid of a fact necessary to state a cause of action but not alleged in the complaint, the pleading will, after judgment, be treated as amended to admit such proof.—*Moss v. Goodhart*, 257.

**Cross-examination—Scope.**

13. The right of cross-examination is a substantial one, and should not be unduly restricted, but the fullest scope should be allowed to the end that the jury may be advised of all facts having a legitimate bearing upon the issues presented.—*Moss v. Goodhart*, 257.

**Rule or Custom in Derogation of Statute—Evidence—Inadmissibility.**

14. *Held*, that the provisions of Chapter 120, Laws of 1911, designed to bring about a lessening of the hazards of coal mining, could not be nullified by any private agreement between employer and employee, or any rule or custom in derogation of the duties imposed by the Act; and therefore evidence of a rule that the miners employed by defendant were to examine and keep safe the entry in which they were working, for a certain distance from the face, the defendant to do the same beyond that point, was properly excluded.—*Kallio v. Northwestern Imp. Co.*, 314.

**Exclusion—Offer of Proof—Failure to Make—Effect.**

15. Where an offer of proof was not made and the probable answer of the witness was not apparent, alleged error in sustaining an objection to a question is not reviewable.—*Taylor v. Malta Mer. Co.*, 342.

**Same—Curing Error.**

16. Error in the exclusion of offered testimony is cured by the subsequent admission of substantially the same evidence.—Taylor v. Malta Mer. Co., 342.

**Constructive Fraud—Good Faith—Evidence—Immateriality.**

17. In an action in claim and delivery based upon constructive fraud in a sale of personal property under section 6128, Revised Codes, testimony offered by the buyer that a bill of sale evidencing the transaction had been filed with the county clerk, and that he had made application for insurance on the property in his own name, was properly refused, since such evidence could only reflect upon the good faith of the parties to the sale,—a matter immaterial in an action in which fraud in law is relied upon.—Taylor v. Malta Mer. Co., 342.

**Same—Consideration—Evidence—Irrelevancy.**

18. In an action of the character mentioned in paragraph 17 above, evidence of the consideration paid for the property in question was irrelevant.—Taylor v. Malta Mer. Co., 342.

**Documentary Evidence—Admissibility.**

19. Papers signed by defendant as director which tended to show that his corporation had been engaged in doing business as such and that he and his associates had acted in the capacity of directors, were properly admitted in evidence as showing use of the corporate franchise.—Daily v. Marshall, 377.

**Declarations—When Admissible in Evidence.**

20. While declarations, to be admissible as part of the *res gestae*, need not have been strictly contemporaneous with the main incident which gave rise to them, they must have been made while the mind of the speaker was laboring under the excitement aroused by the incident, before there was time to reflect and fabricate.—Callahan v. Chicago & Q. R. Co., 401.

**Same—Admissibility—Discretion.**

21. The admissibility of declarations in evidence is largely a matter of sound legal discretion in the trial court, subject to review only in case of manifest abuse thereof.—Callahan v. Chicago & Q. R. Co., 401.

**Personal Injuries—Master and Servant—Railroads—Declarations—Admissibility.**

22. Declarations of a freight train conductor made a half hour or more after an accident to his train upon inquiry by plaintiff, a section foreman who sustained injuries while riding thereon, and of a roadmaster, who did not witness the accident but learned of it after it reached its destination, to the effect that the accident was due to a defective coupler, though inadmissible as part of the *res gestae*, held competent as admissions by agents of defendant company made within the scope of their employment while engaged in the discharge of their duties.—Callahan v. Chicago & Q. R. Co., 401.

**Water Rights—Depositing Debris—Evidence as to Conditions on Adjoining Lands—When Inadmissible.**

23. In the absence of a showing that the conditions at the two places were similar, defendants' evidence that debris had not been deposited upon land situated above that of plaintiff, for damage to crops on which because of defendants' wrongful use of water plaintiff sought damages and injunctive relief, was improperly admitted.—Wallace v. Weaver, 437.

**Stenographers—Reading from Transcript of Notes—Harmless Error.**

24. An official stenographer who had reported the testimony of a witness on a former trial of the cause, who died in the interim between the two trials, was properly permitted to read such testimony

from a transcript made of his notes which had been lost, after swearing to the correctness of the original notes and the transcript; and though technical error was committed in giving him permission to do so without a showing that he had no independent recollection of the testimony (Rev. Codes, sec. 8020), such error was nonprejudicial, the case having been tried without a jury and the other evidence adduced having been amply sufficient to sustain the court's finding.—*O'Rourke v. Grand Opera House Co.*, 459.

**Trial—Evidence—Objections—When Ineffective.**

25. After a question asked a witness has been answered, objection that the matter brought out is irrelevant and incompetent for any purpose comes too late.—*Downs v. Cassidy*, 471.

**Slander—Evidence—Admissibility.**

26. Slanderous words spoken of plaintiff by defendant either before or after the date of the charge laid in the complaint are admissible to show malice.—*Downs v. Cassidy*, 471.

**Same—Wealth of Defendant—Evidence—Admissibility.**

27. Evidence of the wealth of defendant in an action for slander is admissible, it being an element of aid in determining his social rank and influence in society, thus tending to show the extent of the injury suffered by plaintiff; where punitive damages are allowed, such evidence is of assistance in the determination of the extent of the punishment to be inflicted upon defendant.—*Downs v. Cassidy*, 471.

**Positive and Negative Testimony—Effect.**

28. *Held*, in an action for damages sustained in a railroad crossing accident, that the negative character of the testimony of plaintiff's witnesses to the effect that they heard no bell rung or whistle sounded as the train approached the crossing, which was opposed to the positive statement by defendant company's employees that warning was given, did not render it insufficient to warrant the submission of the case to the jury or authorize a finding in favor of plaintiff.—*Walters v. Chicago, M. & P. S. Ry. Co.*, 501.

**Cross-examination—Undue Restriction—Curing Error.**

29. Alleged error in unduly restricting cross-examination was cured by the subsequent admission of testimony of the same witness touching the matters involved in such cross-examination.—*Titus v. Anaconda Copper Min. Co.*, 583.

### EXCEPTIONS.

Necessary to review of alleged error,—see Appeal and Error, 12.

### EXECUTORS AND ADMINISTRATORS.

**Final Accounts—Not to be Approved Until When.**

1. Where an executor or administrator has property in his hands available for the payment of claims outstanding against the estate under his control, his final account cannot be settled or approved until he has made an affirmative showing that they have been paid, or that he has exhausted the property available for such purpose. In *re Williams' Estate*, 325.

**Settlement of Accounts—Conclusiveness.**

2. Orders settling the accounts of an administratrix, in which claims for money advanced by her for the benefit of the estate had been allowed, were conclusive on the estate and all persons interested therein not laboring under any legal disability, in the absence of an affirmative showing on the face of the claims that they were illegal.—In *re Williams' Estate*, 325.



**Advances to Estate—Payment.**

3. While an executor or administrator has no power, by making advances to the estate, to make it his debtor regardless of the character or quality of his claim, such advances, made suitably and in good faith for its benefit, may be allowed and recovered as claims against the estate.—*In re Williams' Estate*, 325.

**Settlement of Final Accounts—Debts Remaining Unpaid—Case at Bar.**

4. *Held*, that an order made by the district court settling and approving the final account of an administrator was error, where it appeared that claims against the estate for advancements made for its benefit, though theretofore properly allowed, remained unpaid, and there was no showing that all property available for their payment had been exhausted.—*In re Williams' Estate*, 325.

**EXPERT TESTIMONY.**

See Witnesses.

**FEEES.**

See License Fees.

**FINDINGS.****Evidence—Sufficiency—Appeal.**

1. Unless the evidence preponderates against findings claimed to be insufficiently supported by it, they will be accepted on appeal as the established facts in the case.—*Wright v. Brooks*, 99; *Farwell v. Farwell*, 574.

**Request Necessary—Implied Findings.**

2. A party who does not request special findings may not on appeal complain of the trial court's failure to make them; in their absence every finding necessary to support the judgment will be implied.—*Farwell v. Farwell*, 574.

**FORFEITURE.**

Of part payments,—see *Contracts*, 2, 11 *et seq.*

**FRAUDULENT CONVEYANCES.****Constructive Fraud—Good Faith—Evidence—Immateriality.**

1. In an action in claim and delivery based upon constructive fraud in a sale of personal property under section 6128, Revised Codes, testimony offered by the buyer that a bill of sale evidencing the transaction had been filed with the county clerk, and that he had made application for insurance on the property in his own name, was properly refused, since such evidence could only reflect upon the good faith of the parties to the sale,—a matter immaterial in an action in which fraud in law is relied upon.—*Taylor v. Malta Mer. Co.*, 342.

**Same—Consideration—Evidence—Irrelevancy.**

2. In an action of the character mentioned in paragraph 1 above, evidence of the consideration paid for the property in question was irrelevant.—*Taylor v. Malta Mer. Co.*, 342.

**Same—Immediate Delivery—Actual and Continued Change of Possession—Evidence—Insufficiency.**

3. Evidence *held* insufficient to prove such an immediate delivery, either manual or symbolical, of property consisting of sheep-shearing machinery, frame buildings, *etc.*, or an actual and continued change

of possession as to meet the requirements of section 6128, Revised Codes, under which transfers of personal property are conclusively presumed to be fraudulent and void as against the creditors of the seller unless accompanied "by an immediate delivery, and followed by an actual and continued change of possession of the things transferred." *Taylor v. Malta Mer. Co.*, 342.

## GOOD FAITH.

Constructive fraud, evidence of good faith immaterial,—see Evidence, 17.

## HARMLESS ERROR.

Permitting official stenographer to read from transcript of notes without showing that he had not any independent recollection of the testimony,—see Evidence, 24.

Exclusion of evidence,—see Evidence, 8.

Undue restriction of cross-examination,—see Evidence, 29.

## HOMICIDE.

See Criminal Law, 9–11.

## HUSBAND AND WIFE.

See Divorce.

## INFANTS.

Contributory negligence,—see Personal Injuries, 14, 15.

## INFORMATIONS.

Demurrer—Specification of ground necessary,—see Criminal Law, 2.

Surplusage,—see Criminal Law, 1.

## INJUNCTION.

See, also, Specific Performance, 1–4.

Record on appeal from injunction order,—see Appeal and Error, 33.

Preliminary—Discretion—Appeal.

1. The granting of, or refusal to grant, a preliminary injunction, with or without notice, as well as the continuing thereof in force after answer, are matters addressed to the discretion of the district court, with the exercise of which the supreme court will interfere only in case of manifest abuse.—*Lowery v. Cole*, 64.

Same—Insufficiency of Complaint—Conclusions.

2. The complaint in a suit to set aside a judgment and vacate the sheriff's sale had to satisfy it, which alleged that the claim forming the basis of the judgment was a "pretense and fraudulent," and "in fraud of the rights" of plaintiffs, but did not set forth the facts upon which the charges of wrongdoing were grounded, was insufficient under section 6532, Revised Codes, and therefore did not justify the court in granting an injunction *pendente lite* against execution and delivery of the sheriff's deed.—*Brandt v. McIntosh*, 70.

## INSANITY.

Expert testimony invading province of jury,—see Evidence, 5.

## INSOLVENCY.

Of corporation, right of creditor to reduce claim to judgment,—see Corporations, 21.

## INSTRUCTIONS.

**Appellant may not Complain of, When.**

1. Of an instruction in appellant's favor he cannot complain.—Murphy v. Nett, 38.

**Wills—Capacity to Make—Test—Instruction—Proper Refusal.**

2. An instruction in a will contest that a less degree of mind is required to execute a will than is necessary to execute a contract was properly refused.—Murphy v. Nett, 38.

**To be Given in Writing.**

3. In the absence of a waiver by the parties to a criminal prosecution, the instructions to the jury must, under section 9271, Revised Codes, be delivered in writing.—State v. Tudor, 185.

**Equity—General Verdict—Submission to Jury Erroneous.**

4. In an equity case tried with a jury, only the formal instructions should be given, and a general verdict should not be submitted.—Moss v. Goodhart, 257.

**Appeal and Error—Theory of Case—Equity.**

6. Where appellant acquiesced in the trial of a cause as a suit in equity, he was bound on appeal by the theory thus adopted, and was therefore not in position to complain of alleged error in giving or refusing instructions to the jury.—Moss v. Goodhart, 257.

**Invasion of Province of Jury.**

7. Where the evidence was in conflict as to which of the parties to a contract of sale of livestock, for the breach of which plaintiff sought recovery in an action in which defendant interposed a counterclaim, was in default, the court erred in charging the jury in effect that defendant was.—Clifton v. Willson, 305.

**When Properly Refused.**

8. An instruction unsupported by the pleadings or evidence, as well as contrary to the theory on which the party offering it tried the case, may properly be refused.—Melzner, Admr., v. Raven Copper Co., 351.

**Refusal—Review—Record—Insufficiency.**

9. Where the record, though giving the settlement of certain instructions, failed to set out the instructions as read to the jury, refusal to give one offered by appellant will not be reviewed.—Melzner, Admr., v. Raven Copper Co., 351.

**Personal Injuries—Contributory Negligence—Proper Refusal.**

10. Where neither the complaint nor the evidence of plaintiff in an action for negligent death was such as to raise the presumption of contributory negligence on the part of decedent, no burden of showing freedom therefrom rested on plaintiff; therefore an instruction placing such burden upon him was properly refused.—Melzner, Admr., v. Raven Copper Co., 351.

**Law of Case.**

11. The instructions to the jury constitute the law of the case, whether right or wrong; a verdict rendered contrary to them is against law and cannot stand.—Wallace v. Weaver, 437.

**Evidence—Instruction to Disregard—When Improper.**

12. Where evidence was admissible for the purpose stated by counsel for the party introducing it, although inadmissible for another, a request that the court instruct the jury to disregard it entirely was properly refused.—Titus v. Anaconda Copper Min. Co., 583.

## INTEREST.

On public funds,—see Cities and Towns, 7-9.

Forfeiture—Erroneous Decree.

1. A cause of action to recover unpaid interest on a note (with attorney's fees for collecting same), the principal of which was erroneously decreed forfeited to plaintiff, falls with the forfeiture.—Cook-Reynolds Co. v. Chipman, 289.

## INTERSTATE COMMERCE.

Invalidity of statute imposing a tax upon,—see Constitution, 1.

Regulation of, by state, constitutionality of statute regulating county printing,—see Constitution, 5.

## JUDGMENTS.

Admissibility of parol evidence to ascertain extent of decree in water right suit,—see Water and Water Rights, 3.

Dismissal of appeal from judgment, effect on appeal from new trial order,—see Appeal and Error, 2.

"Duly given and made," burden of proving jurisdictional facts, when,—see Pleading and Practice, 13.

Failure to establish mechanic's lien, right to personal judgment,—see Mechanics' Liens, 2.

Justices' Courts—Presumptions.

1. The legal presumptions which may be indulged in favor of judgments of courts of record have no application to justices' courts, but the jurisdictional facts must be made to appear affirmatively.—Miller v. Miller, 150.

Same—Default Judgment—Order Setting Aside not Appealable.

2. An appeal does not lie from an order of a justice of the peace sustaining a motion to set aside a default judgment.—Burch v. Roberson, 456.

## JURISDICTION.

See District Courts; Election Contests; Justices of the Peace.

## JUSTICES OF THE PEACE.

Judgments—Validity—Proof of Jurisdictional Facts Necessary—Presumptions.

1. In an action to quiet title, defendant relied upon a sheriff's deed to the property which had been sold on execution issued under a judgment alleged to have been "duly given and made" in a justice's court; the docket of the justice, entries in which are made *prima facie* evidence of the facts stated therein by section 7071, Revised Codes, having been lost and proof of its contents found not available, defendant introduced an abstract of the judgment filed with the clerk of the district court pursuant to section 7057, as *prima facie* evidence of the validity of the judgment. *Held*, under the rule that justices' courts being courts of limited jurisdiction, the legal presumptions which may be indulged in favor of judgments of courts of record have no application to them, but that the jurisdictional facts must be made to appear affirmatively, and the abstract not being made evidence of any fact by statute, defendant failed to prove the validity of the judgment.—Miller v. Miller, 150.

**Default Judgment—Order Setting Aside—Not Appealable.**

2. An appeal does not lie from an order of a justice of the peace sustaining a motion to set aside a default judgment, open the default and permit an answer to be filed, or from any order, the only appeal permitted from such a court being from a judgment.—*Burch v. Roberson*, 456.

**LACHES.**

See, also, Elections, 4, 5; Mandamus, 4.

**Presumptions.**

1. While laches may arise from an unexplained delay short of the period fixed by the statute of limitation, it will not be presumed from such delay alone.—*Wright v. Brooks*, 99.

**Specific Performance—Laches not Alone Sufficient to Defeat.**

2. A vendee in possession of realty is not barred from specific performance by mere delay in bringing suit; he may rest in security until his title or right of possession is attacked.—*Wright v. Brooks*, 99.

**Sale—Deferred Payments—Notice of Due Date.**

3. Under a contract of sale by the terms of which failure to pay an installment of the purchase price ends the contract, time being expressly declared of the essence of it, notice that an installment has fallen due is not required, and therefore a claim that plaintiff was guilty of laches because of delay in giving it had no merit.—*Fratt v. Daniels-Jones Co.*, 487.

**LANDLORD AND TENANT.**

**Constructive Eviction—Evidence—Sufficiency.**

1. Evidence in an action by a tenant against his landlord for damages based upon a constructive eviction, where the former, in reliance upon a five-year lease of a building theretofore occupied by him as a lodging-house, had made expensive alterations and improvements with a view to continuing in such business, and the latter, desirous of regaining possession of the premises for a more profitable use but failing in his efforts to procure plaintiff's consent to a cancellation of the lease, erected a garage immediately adjoining the lodging-house, the noises and fumes originating in and emanating from which rendered the leased premises unfit for occupancy for lodging-house purposes, and caused plaintiff to quit the premises, *held*, sufficient to warrant a finding by the jury in favor of the latter.—*Blaustein v. Pincus*, 202.

**Acts of Third Persons—Defense not Available, When.**

2. The acts of owners of automobiles who made use of defendant's garage, in getting them in and out having been only such as defendant must have known would be incident to the use of the building as a garage, the contention that under the rule that the acts of third persons impairing the usefulness or enjoyment of demised premises do not amount to an eviction by the lessor, defendant could not be held responsible for the noise, fumes and smells created by them, was without merit.—*Blaustein v. Pincus*, 202.

**Damages—Past Profits—Admissibility.**

3. Evidence of profits which plaintiff had actually realized during his occupancy of the premises prior to the acts of defendant which culminated in the former's eviction, objected to as incompetent, speculative and remote, was properly admitted in proof of damages sustained by plaintiff.—*Blaustein v. Pincus*, 202.

**LAST CLEAR CHANCE DOCTRINE.**

See Personal Injuries, 13.

## MANDAMUS.

## LAW OF CASE.

See Instructions, 11.

## LICENSE FEES.

Filing of articles of foreign corporations,—see Constitution, 1.

## LIENS.

See Mechanics' Liens.

## LIQUIDATED DAMAGES.

See Damages, 4.

## MANDAMUS.

Judgment—*Res Adjudicata*—Damages.

1. *Mandamus*, though a remedy civil in its nature, is not a civil action in the sense that the parties to such a proceeding and their privies are, on principles of *res adjudicata*, barred by the judgment from thereafter maintaining an action for damages flowing from the wrong which gave rise to the proceeding in *mandamus*.—Bailey v. Edwards, 363.

## Damages Recoverable.

2. The damages allowable under section 7224, Revised Codes, in a *mandamus* proceeding are such as are incidental to the proceeding itself, and not those arising out of the transaction which the writ was invoked to redress.—Bailey v. Edwards, 363.

## Police Officers—Wrongful Discharge—Action for Damages.

3. *Held*, under the rule announced in paragraph 1, *supra*, that a police officer who had successfully prosecuted a *mandamus* proceeding for reinstatement to office from which he had been unlawfully removed, was not barred, by reason of such judgment, from thereafter maintaining an action against the mayor personally to recover damages measured by the salary which plaintiff would have earned but for such exclusion from office.—Bailey v. Edwards, 363.

## Same—Wrongful Discharge—Laches.

4. Under the rule that mere lapse of time before applying for relief by way of mandate is not sufficient reason for denial thereof, unless the delay has resulted in prejudice to the rights of the adverse party (or the relief sought depends upon doubtful and disputed questions of fact), relator, a policeman discharged contrary to the provisions of the Metropolitan Police Law (Rev. Codes, secs. 3304–3312), *held* not to have been barred because of laches in waiting thirteen months before taking action for his reinstatement, such delay having been due to a desire to await final settlement of law questions in a similar proceeding then pending.—State ex rel. Bennetts v. Duncan, 447.

## When not Appropriate Remedy.

5. *Mandamus* may not be invoked to correct a judgment entered by the district court, or where the remedy by appeal is plain, speedy and adequate.—State ex rel. Centennial Brewing Co. v. District Court, 547.

## City Council—Official Oath—Duty to File—Records.

6. The official oath of an alderman being required to be subscribed must be in writing, and is intended to become a record of the city; and since under section 3253, Revised Codes, the city clerk must keep all records, papers, *etc.*, of the city, he may be compelled by *mandamus* to file such oath, as well as record the vote of such alderman upon the question of filling a vacancy in the council, his vote constituting part

of its proceedings at the meeting at which the vacancy was filled, of which record must be made.—State ex rel. Willson v. Willis, 548.

**Writ Does not Lie, When.**

7. *Mandamus* does not lie when the writ will accomplish no beneficial result, as where an official act (the issuance of a certificate of sale of state land by the register of state lands) is sought to be compelled, which depends upon the approval or co-operation of a third person (the governor, as president of the board of land commissioners), not a party to the proceeding.—State ex rel. Danaher v. Ray, 570.

#### MASTER AND SERVANT.

See Personal Injuries.

#### MECHANICS' LIENS.

**Complaint—Erroneous Description of Land—When Fatal.**

1. One of the prerequisites prescribed by section 7291, Revised Codes, to make valid a lien on land for labor performed in clearing it was a notice containing a description thereof sufficiently accurate to enable identification of the property affected; hence, where in a suit to foreclose such a lien the description in the decree differed from that found in the complaint as well as that contained in the notice, so that identification of the lands sought to be charged was impossible, the decree ordering them to be sold will be reversed.—Ivanhoff v. Teale, 115.

**Failure to Establish—Personal Judgment.**

2. Where one to whom money is due for labor performed fails to establish a lien on the property on which it was done, because of non-observance of the statutory provisions relative to perfecting it, he is nevertheless entitled to a personal judgment for the amount found due from defendant.—Ivanhoff v. Teale, 115.

#### METROPOLITAN POLICE LAW.

See Police Officers; *Mandamus*, 3, 4.

#### MINES AND MINING.

See, also, Coal Mining; Personal Injuries, 1-3.

Unguarded mining shafts,—see Personal Injuries, 14-19.

#### MINORS.

See Infants.

#### MISJOINDER.

Of causes of action,—see Pleading and Practice, 9.

#### MUNICIPAL CORPORATIONS.

See Cities and Towns; also Counties, 1.

#### NATIONAL BANKS.

See Banks.

#### NEGLIGENCE.

See Personal Injuries.

#### NEW COUNTIES.

See Counties, 9-12.

## NEW TRIAL.

Effect of dismissal of appeal from judgment, on appeal from new trial order,—see Appeal and Error, 2.

Questions not reviewable on appeal from new trial order,—see Appeal and Error, 30.

## New Trial Order—Affirmance, When.

1. An order granting a new trial asked for on the ground of errors of law occurring at the trial will be affirmed if it appear that any such errors of a substantial character were committed.—Hulse v. Northern Pacific Ry. Co., 59.

## Notice of Motion—"Upon Minutes of Cause"—Sufficiency.

2. A notice of intention to move for a new trial was not rendered abortive by the statement that the motion would be based "upon the minutes of said cause," instead of "upon the minutes of the court," the statutory language (Rev. Codes, sec. 6795), the former phrase, so far as imparting the information intended by the section to be given to the opposing party is concerned, being substantially equivalent to the latter.—Moore v. Butte Electric Ry. Co., 214.

## Motion—Mode of Procedure.

3. One intending to move for a new trial upon any ground other than those mentioned in the first four subdivisions of section 6794, Revised Codes, may, under section 6795, do so either upon the minutes of the court or a bill of exceptions; if he have several grounds, he may select one method for one ground of his motion, and another for the remaining ground or grounds.—Moore v. Butte Electric Ry. Co., 214.

## Appeal—Presumptions.

4. Plaintiff's notice of intention to move for a new trial specified seven grounds, among them insufficiency of the evidence and that the verdict was against law, and stated that the motion would be based, *inter alia*, upon the minutes of the court. While the record on appeal disclosed the methods pursued in presenting the other grounds, it was silent as to the course pursued in relation to the two mentioned above, both of which are properly reviewable upon the minutes. *Held*, that it being the duty of appellant to show error in the court in granting the motion, and no error having been made apparent in other respects, it will be presumed that the order, so far as relates to the two grounds specified *supra*, was based upon the minutes.—Moore v. Butte Electric Ry. Co., 214.

*De Minimis non Curat Lex.*

5. Under the *de minimis* doctrine, a new trial will not be ordered where the difference between the parties amounts to \$2.38.—Mantle v. White, 234.

## Record—Insufficiency.

6. An alleged irregularity said to have prevented appellant from having a fair trial, not shown by the record to have been called to the attention of the court, although the notice of intention to move for a new trial specified irregularity in the proceedings as one of the grounds, will not be reviewed on appeal.—Melnzer, Admr., v. Raven Copper Co., 351.

## Recovery of Nominal Damages.

7. A new trial should not be granted for the sole purpose of enabling appellant to recover nominal damages, unless he is substantially prejudiced by a failure to award such damages, as where the judgment carries costs.—Wallace v. Weaver, 437.

## Excessive Damages—Discretion—Appeal.

8. Unless, after making due allowance for the superior position occupied by a district judge in the trial of a cause, the supreme court is



compelled to the conclusion that he abused his discretion in refusing a new trial asked for on the ground of excessive damages, his action will be affirmed.—*Downs v. Cassidy*, 471.

#### NOMINAL DAMAGES.

See *Damages*, 1, 3, 7, 8.

#### NONSUIT.

Improper refusal,—see *Personal Injuries*, 43, 44.

*Statute of Limitations*—*Duty of Court*.

1. Where upon the trial of a cause it is made apparent that the action is barred under the statute of limitations, it is the duty of the court to grant a nonsuit.—*City of Butte v. Goodwin*, 155.

*Erroneous Reason for Correct Ruling*—*Affirmance*.

2. An order granting a nonsuit will be affirmed if correct in result, even though the particular reason given for the ruling was erroneous. *City of Butte v. Goodwin*, 155.

*When Proper*.

3. An order of nonsuit was proper in an action by an illegally discharged police officer for damages, where no causal connection between the unlawful preclusion from office and loss of emoluments had been made to appear.—*Bailey v. Edwards*, 363.

#### NOTICE.

Of due date of installment on contract of sale, when not required,—see *Contracts*, 26.

Of special meeting of board of directors of corporation,—see *Corporations*, 16, 17.

#### OATHS OF OFFICE.

See *Cities and Towns*, 13, 16.

#### OBJECTIONS.

And exceptions necessary to review of alleged error,—see *Appeal and Error*, 12.

*Trial—Evidence—Objections—When Ineffective*.

1. After a question asked a witness has been answered, objection that the matter brought out is irrelevant and incompetent for any purpose comes too late.—*Downs v. Cassidy*, 471.

#### OFFER AND ACCEPTANCE.

See *Contracts*, 5, 8.

#### OFFER OF PROOF.

Failure to make, effect,—see *Appeal and Error*, 21.

#### OFFICERS.

See, also, *Police Officers*.

*Bonds of, nature of undertaking*,—see *Cities and Towns*, 11.

*Liability of surety companies on bonds of*,—see *Suretyship*, 1-4.

*Official oath, failure of city officers to take*,—see *Cities and Towns*, 13.

*Official oath of alderman, duty of clerk to file*,—see *Cities and Towns*, 16.

## OPTIONS.

See Contracts, 4, 5, 8.

## ORDERS.

Nonappealable,—see Appeal and Error, 29.

## PARTIES.

Defendants, to water right suits—Determination of rights *inter sese*,—see Water and Water Rights, 2.

## PARTNERSHIP.

One Partner Acting for Copartner—Evidence—Sufficiency.

1. Evidence *held* sufficient to justify a finding that the person who entered into an oral agreement to sell real property to plaintiff in an action for specific performance, acted for himself as well as in behalf of his copartners.—Wright v. Brooks, 99.

Power of Partner to Convey Land.

2. One member of a firm could rightfully enter into an agreement to sell property standing in the firm name, and convey the legal title.—Wright v. Brooks, 99.

## PART PAYMENT.

See Payment.

## PAYMENT.

Realty—Contracts of Sale—Breach by Purchaser—Part Payments—Recovery Back.

1. A purchaser of real property under an oral agreement, who has made a partial payment on the purchase price and then voluntarily terminates the agreement, cannot recover back such payment in the absence of a showing that defendant is unable or unwilling to carry out the contract.—Perkins v. Allnut, 13.

Advance Payments—Forfeiture.

2. In the absence of an equitable showing, a defaulting purchaser of property is not entitled to a return of any part payments made by him, even though there is no provision in the contract of sale for liquidated damages in case of default.—Cook-Reynolds Co. v. Chipman, 289; Clifton v. Willson, 305; Fratt v. Daniels-Jones Co., 487.

## PERSONAL INJURIES.

Master and Servant—Violation of Statute—Negligence *Per Se*—Defenses Available to Master.

1. Where a statute, whether penal or not, makes a requirement or prohibits a thing for the benefit of a person or class of persons, a violation thereof constitutes negligence *per se*, and one injured by reason of its nonobservance is entitled to maintain an action against him by whose disobedience he has suffered harm; defendant in such an action, however, may defend on the grounds of contributory negligence, assumption of risk, *etc.*, unless such defenses are expressly abrogated by the statute.—Melville v. Butte-Balaklava Copper Co., 1.

Same—Servant *in Pari Delicto* With Master—Effect on Right of Recovery.

2. Under the rule that an action does not lie at the suit of one who must base his claim, in whole or in part, on the violation of a crimi-

nal or penal law of the state, a miner who was killed while working in violation of sections 1739, 1740, Revised Codes, providing that eight hours shall constitute a day's work in mines under penalty of fine and imprisonment in the county jail, could not, if he had survived his injuries, recover damages in an action brought for that purpose.—*Melville v. Butte-Balaklava Copper Co.*, 1.

**Same—Death of Servant—Right of Action—Statutory Construction.**

3. *Held*, that section 6486, Revised Codes, in providing that when the death of a person is caused by the "wrongful act or neglect of another" his heirs or personal representatives may maintain an action for damages, *etc.*, implies actionable wrong or negligence toward the decedent and not toward his surviving wife and children; *held*, further, that it did not create a cause of action in their favor, to which the defendant could not interpose the defenses of contributory negligence, assumption of risk, *etc.*, but that their right to recover damages depended upon whether decedent, had he survived the injuries, could have done so.—*Melville v. Butte-Balaklava Copper Co.*, 1.

**Railroads—Trespassers—Self-serving Declarations—Inadmissibility.**

4. Self-serving declarations of plaintiff in an action for personal injuries sustained in being run over by a freight train on which he was riding without paying fare, to the effect that he had been pushed off by a brakeman, *held*, not part of the *res gestae* but mere narratives of a past transaction, and therefore properly excluded.—*Hulse v. Northern Pacific Ry. Co.*, 59.

**Self-serving Declarations—Rebuttal—Admissibility.**

5. Defendant's witnesses having testified to a remark made by plaintiff soon after the accident, to the effect that someone had pushed him off the car, but that he did not say that a brakeman had done so, rebuttal testimony that he had made the latter statement was improperly excluded; it was admissible under section 7871, Revised Codes, even though the declaration thus made by him was self-serving.—*Hulse v. Northern Pacific Ry. Co.*, 59.

**Pleadings—Reply—When Unnecessary.**

6. Where the complaint in an action by a passenger against a street-car company alleged, *inter alia*, that a telegraph pole, with which plaintiff collided while riding on the footboard of a crowded car, had been placed within a distance of less than four feet from the track, the affirmative allegation in the answer that such pole was not less than four feet and one inch away from the track did not constitute new matter but was the equivalent of a direct denial, requiring no reply.—*Previsich v. Butte Electric Ry. Co.*, 170.

**Pleading and Proof—Immaterial Variance.**

7. Between an allegation in the complaint that the telegraph pole with which plaintiff came in collision while standing upon the footboard of a crowded street-car was placed at a distance of less than four feet from the track, and evidence that it was within dangerous proximity to the track, there was not such variance as to preclude recovery.—*Previsich v. Butte El. Ry. Co.*, 170.

**Street Railways—Crowded Cars—Duty of Carrier to Warn Passenger.**

8. Where a telegraph pole is in such dangerous proximity to a street-car track as to constitute it a menace to the safety of a passenger whom the company, owing to want of space inside, permits to stand on the footboard, the moving of the car without properly warning him is culpable negligence.—*Previsich v. Butte El. Ry. Co.*, 170.

**Same—Negligence—Burden of Proof—Instructions—Proper Refusal.**

9. The burden was on plaintiff to prove that his injury was the result of defendant's failure to exercise such precautions as the case required, including omission to warn him of the dangerous proximity of telegraph poles, by contact with one of which he was brushed from the footboard where he was riding; hence an instruction requested by defendant which in effect would have cast such burden upon it was properly refused.—*Previsich v. Butte El. Ry. Co.*, 170.

**Same—Crowded Cars—Passenger Standing on Footboard not Contributory Negligence *Per Se*.**

10. It is not contributory negligence *per se* for a person to ride upon a crowded car or upon the platform or footboard thereof; therefore an instruction that if plaintiff knew that the car on the footboard of which he was riding was crowded when he got on, he assumed the risk of being struck by telegraph poles erected alongside the track, even though he knew nothing of their proximity to the track, was properly refused; whether a passenger under such circumstances should be held to have assumed the hazard of his position is generally a question of fact for the jury, and not one of law for the court.—*Previsich v. Butte El. Ry. Co.*, 170.

**Excessive Verdicts.**

11. Verdict for \$5,000 in favor of plaintiff, of the age of twenty-one years at the time of the accident referred to in the paragraphs *supra*, scaled to \$2,500.—*Previsich v. Butte El. Ry. Co.*, 170.

**Street Railroads—Rights of Travelers on Bridges—Contributory Negligence.**

12. *Obiter*: A traveler in attempting to cross a bridge while riding a horse which, though up to that time gentle and accustomed to street-cars, became restive and unmanageable at the approach of a car, or in failing to retire therefrom, did not thereby become a trespasser upon the right of way of the railway company over the bridge, nor lay himself open to the charge of being guilty of contributory negligence as a matter of law.—*Singer v. Missoula Street Ry. Co.*, 218.

**Same—Last Clear Chance—Negligence of Motorman Jury Question.**

13. Upon the assumption that plaintiff, in going upon the bridge on horseback under the conditions set forth in paragraph 12 *supra*, was guilty of negligence, and that the facts made the doctrine of the last clear chance applicable, evidence held to have made out a case for the jury upon the question whether the motorman in charge of the car in colliding with which plaintiff was injured, took such precautions as he should have taken to avoid injury to the latter, after he discovered his perilous position.—*Singer v. Missoula Street Ry. Co.*, 218.

**Mining Claims—Unguarded Shafts—Infants—Contributory Negligence—Complaint.**

14. Contributory negligence may not be inferred, as a matter of law, from the acts of a child seven years old; hence the rule that plaintiff in a personal injury action, who by his complaint shows that a proximate cause of his injury was an act of his own, is barred of recovery unless he also shows that he was exercising ordinary care and circumspection at the time of the accident, has no application where the injured party was an infant of the age above mentioned.—*Conway v. Monidah Trust*, 269.

**Same—Complaint—Sufficiency.**

15. Conceding that the rule of pleading referred to in paragraph 14, *supra*, is applicable in an action where plaintiff is a minor of the

age of seven years, it was met by the allegations of plaintiff's age; that at the time he fell into a shaft on defendant's mining claim, left unguarded (contrary to the provisions of section 8535, Revised Codes), it was dusk; that he was ignorant of the existence of the shaft, and engrossed in gathering wild flowers growing on the edge of said shaft; that he was using due care and prudence, and was without contributing fault and carelessness on his part in doing what he did.—Conway v. Monidah Trust, 269.

**Same—Unguarded Mining Shafts—Statutes—Noncompliance With—Negligence *Per Se*.**

16. Failure to observe the duty imposed by section 8535, Revised Codes, upon the person owning or in possession of property within the limits of a city or town or within one mile of such limits, on which there is a mining shaft, to place a cover over or a tight fence around the same, is negligence *per se*.—Conway v. Monidah Trust, 269.

**Same—Trespass—Liability of Owner.**

17. Though a plaintiff infant was a technical trespasser upon defendant's mining claim, into an unguarded shaft on which he fell, the defendant's omission to comply with the requirement imposed upon him by section 8535, Rev. Codes, rendered him liable to damages for injuries suffered by the plaintiff.—Conway v. Monidah Trust, 269.

**Same—Unguarded Mining Shaft—Statutes.**

18. The fact that defendant had not sunk the shaft into which plaintiff fell did not relieve him of liability, section 8535, Rev. Codes, making it unlawful for the owner or possessor to permit "any such shaft \* \* \* to remain open or unprotected for a period of more than ten days," without regard to when or by whom it was sunk.—Conway v. Monidah Trust, 269.

**Same—Location of Shaft—Evidence—Insufficiency.**

19. Evidence held insufficient to show that the shaft into which plaintiff fell was situated within a mile of the corporate limits of a city, a fact necessary to be shown to bring defendant within the purview of section 8535, Revised Codes.—Conway v. Monidah Trust, 269.

**Negligence—Evidence—Sufficiency.**

20. Evidence held sufficient to warrant a finding that defendant carelessly and negligently, for the purpose of frustrating a hold-up in his saloon, fired a shotgun into a room where plaintiff was standing and seriously injured him.—Simonich v. Quilici, 286.

**Coal Mines—Safe Place.**

21. The rule that the master must exercise ordinary care and diligence to provide his employees with a reasonably safe place in which to work, though not applying where they are creating the place of work, when it is constantly being changed in character by their work, or when it only becomes dangerous by their carelessness or negligence, does obtain where the place is a completed one, such as that part of a mine tunnel lying behind the miner driving it, and is applicable to coal mines as well as to any other place of employment.—Kallio v. Northwestern Improvement Co., 314.

**Same—"Working Place"—Coal Mine Act—Construction.**

22. The "working place" which a coal miner must, under section 83 of the Coal Mine Act (Laws 1911, Chap. 120), examine before commencing to work and keep safe, is any place where he may be directed to work, and not merely the face of the entry or that portion of the walls or roof thereof which might be shaken by blasting.—Kallio v. Northwestern Improvement Co., 314.

**Same—Duty of Inspection—Upon Whom.**

23. Under the Coal Mine Act (Laws 1911, Chap. 120), it is the duty of both employer and employee to look after the safety of the place where mining is being done; and the fact that at a given time one of such places may not be the seat of active operations, and therefore subject to the exclusive inspection of the operator, does not absolve the miner from the duty of examining it when he is about to work there.—*Kallio v. Northwestern Improvement Co.*, 314.

**Same—Parties in *Pari Delicto*—Effect on Right to Recover.**

24. Where neither defendant coal mine operator nor plaintiff, one of his employees, observed the statutory duty of inspection imposed upon them by the Coal Mine Act, the parties were in *pari delicto*, and plaintiff was therefore in no position to recover damages for an accident due to such nonobservance.—*Kallio v. Northwestern Improvement Co.*, 314.

**Same—Rule or Custom in Derogation of Act—Evidence—Inadmissibility.**

25. *Held*, that the provisions of Chapter 120, Laws of 1911, designed to bring about a lessening of the hazards of coal mining, could not be nullified by any private agreement between employer and employee, or any rule or custom in derogation of the duties imposed by the Act; and therefore evidence of a rule that the miners employed by defendant were to examine and keep safe the entry in which they were working, for a certain distance from the fence, the defendant to do the same beyond that point, was properly excluded.—*Kallio v. Northwestern Improvement Co.*, 314.

**Master and Servant—Contributory Negligence—Complaint—Sufficiency.**

26. *Held*, that the plaintiff in an action to recover damages under section 5248, Revised Codes, need not allege in his complaint that the injury sustained was caused "without contributing negligence on his part," such negligence being matter of defense to be asserted and shown by defendant employer unless made apparent by plaintiff's own pleading or proof.—*Melzner v. Raven Copper Co.*, 351.

**Same—Joint Tort-feasors—Verdict as to One Only—Effect.**

27. Where the verdict in an action for wrongful death brought jointly against a mine operator and a hoisting engineer under section 5248, Revised Codes, by which the former is made responsible for injuries to his employees under the maxim *respondeat superior*, was silent as to the engineer, the failure of the jury to find as to him was not a finding of non-negligence on his part, but should be regarded as no finding as to him.—*Kallio v. Northwestern Improvement Co.*, 351.

**Same—Contributory Negligence—Instructions—Proper Refusal.**

28. Where neither the complaint nor the evidence of plaintiff in an action for negligent death was such as to raise the presumption of contributory negligence on the part of decedent, no burden of showing freedom therefrom rested on plaintiff; therefore an instruction placing such burden upon him was properly refused.—*Melzner v. Raven Copper Co.*, 351.

**Master and Servant—Railroads—Declarations—Admissibility.**

29. Declarations of a freight train conductor made a half hour or more after an accident to his train upon inquiry by plaintiff, a section foreman who sustained injuries while riding thereon, and of a roadmaster, who did not witness the accident but learned of it after it reached its destination, to the effect that the accident was due to a defective coupler, though inadmissible as part of the *res gestae*, held competent as admissions by agents of defendant company made within the scope

of their employment while engaged in the discharge of their duties.—*Callahan v. Chicago, B. & Q. Ry. Co.*, 401.

**Same—*Res Ipsa Loquitur*—Applicability of Doctrine.**

30. If in a personal injury action by an employee against his employer, the facts and circumstances brought out on the trial tend to show that the instrumentality which caused the injury was exclusively in the control of the employer and the accident occurred because of some defect therein, the existence of which was attributable to a negligent omission of duty by the latter, rather than to any other cause, the burden devolves upon him to rebut the presumption of negligence thus raised, by explaining the circumstances so as to render their existence consistent with the exercise of due care on his part.—*Callahan v. Chicago, B. & Q. Ry. Co.*, 401.

**Same.**

31. *Held*, under the doctrine of *res ipsa loquitur*, that a nonsuit was improperly granted in an action by a railroad employee against the company where plaintiff's proof tended to show that the accident was due to a defective coupler, thus pointing to neglect on the part of defendant to perform a primary, nondelegable duty, i. e., to see that the train on which plaintiff was riding was equipped with sound and suitable appliances.—*Callahan v. Chicago, B. & Q. Ry. Co.*, 401.

**Cities and Towns—Contributory Negligence—Complaint—Sufficiency.**

32. The complaint in an action against a city, charging that the proximate cause of plaintiff's injuries was defendant's negligence in leaving unguarded an excavation in one of its streets into which he fell, was not open to attack on the ground that though it appeared from the allegations therein that the accident was due to his own act, it failed to state facts exculpating him from the imputation of contributory negligence in acting as he did.—*Nilson v. City of Kalispell*, 416.

**Same—Instructions—Theory of Case—Binding on Appeal.**

33. Defendant city having acquiesced in the giving of an instruction that as contributory negligence not been pleaded or shown by the evidence of either party, plaintiff must be assumed to have used the street in a proper manner and without negligence, was bound by the theory of the case thus adopted, and was not in position to urge a reversal of the judgment on the alleged ground that the evidence showed contributory negligence on plaintiff's part.—*Nilson v. City of Kalispell*, 416.

**Same—Contributory Negligence—Jury Question.**

34. Whether the city had exercised reasonable care to keep the street in a condition for use by providing a safe driveway twelve or fourteen feet wide in the middle of the street into an excavation in which plaintiff fell while riding a bicycle, *held* a jury question.—*Nilson v. City of Kalispell*, 416.

**Same—Contributory Negligence—Presupposes Negligence on Part of Defendant.**

35. A charge made by defendant that plaintiff was guilty of contributory negligence in using the street the way he did when he was injured presupposes actionable negligence on the part of the city.—*Nilson v. City of Kalispell*, 416.

**Same—Streets—Safety—Presumptions.**

36. Though a traveler on a city street may not close his eyes to an obvious danger, he is not obliged to make a special effort to discover defects; he may presume that the thoroughfare is in an ordinarily safe condition.—*Nilson v. City of Kalispell*, 416.

**Evidence—Contributory Negligence—Appeal.**

37. In the absence of anything indicating such an inherent improbability in the evidence of plaintiff as to deny it credibility, and in

view of the verdict of the jury in his favor and the action of the trial court in denying defendant's motion for a new trial, the supreme court will not say that plaintiff should not have recovered because he was shown to have been negligent as a matter of law.—*Nilson v. City of Kalispell*, 416.

**Excessive Verdict—Review.**

38. Verdict for \$3,500 for personal injuries to plaintiff, a skilled mechanic of the age of forty-four years of age, who, at the time of the accident, was earning from \$160 to \$175 per month, and for nine months thereafter was under a physician's care, for six or seven months of which time he had not been able to earn anything, whose earning capacity up to the time of the trial had been reduced about \$100 per month, and who had incurred doctor's and hospital bills for about \$375, *held* not excessive.—*Nilson v. City of Kalispell*, 416.

**Railroad Crossings—Warning—Positive and Negative Testimony—Effect.**

39. *Held*, in an action for damages sustained in a railroad crossing accident, that the negative character of the testimony of plaintiff's witnesses to the effect that they heard no bell rung or whistle sounded as the train approached the crossing, which was opposed to the positive statement by defendant company's employees that warning was given, did not render it insufficient to warrant the submission of the case to the jury or to authorize a finding in favor of plaintiff.—*Walters v. Chicago, M. & P. S. Ry. Co.*, 501.

**Same—Automobiles—Care Required of Driver—Contributory Negligence.**

40. The driver of an automobile may not, in the absence of express statute, be held guilty of contributory negligence, as a matter of law, for failing to stop, look and listen when approaching a railway crossing, his duty in this regard going no further than to exercise such care and caution for his own safety as might be expected of an ordinarily prudent person under like circumstances.—*Walters v. Chicago, M. & P. S. Ry. Co.*, 501.

**Same—Contributory Negligence—Evidence.**

41. Evidence *held* not to necessitate the conclusion that plaintiff was guilty of contributory negligence in attempting to drive an automobile over a railway crossing situated in a cut from eight to twelve feet deep, where he was struck by a train running from forty-five to fifty-five miles an hour.—*Walters v. Chicago, M. & P. S. Ry. Co.*, 501.

**Same—Excessive Verdict.**

42. Plaintiff at the time of the accident was twenty-three years of age, earning \$125 per month. The injuries received were such as to forever prevent him from pursuing his trade of stereotyper. At the time of the trial he was earning \$80 per month. His earning capacity had been totally destroyed for about one year. His injuries were serious, one of their effects being a shortening and partial paralysis of one of his legs. *Held*, that a verdict for \$15,000 was not so excessive as to evince passion and prejudice.—*Walters v. Chicago, M. & P. S. Ry. Co.*, 501.

**Defective Appliances—Evidence—Nonsuit—Improper Refusal.**

43. Evidence in an action by a sawmill employee to recover damages for injuries sustained while unloading logs from flat cars, alleged to have been caused by defendant's negligence in furnishing a defective chain with which to tie the logs, *held*, not to show that the accident was due to any omission of duty on the part of defendant, rather than to the negligence of plaintiff himself, but to present a case in which a motion for nonsuit should have been sustained, for lack of a showing of a direct causal connection between the negligence alleged and the injury—the cause of the accident being left to conjecture.—*Andree v. Anaconda Copper Min. Co.*, 554.



**Conjecture as to Cause—Nonsuit.**

44. While a showing that the personal injury made the basis of plaintiff's action is more naturally attributable to the negligence alleged in his complaint than to any other cause is sufficient to make out a *prima facie* case, evidence which leaves it doubtful whether the injury may not with equal propriety be attributed to one or more causes other than that alleged does not suffice to meet such requirement.—*Andree v. Anaconda Copper Min. Co.*, 554.

**Complaint—Sufficiency.**

45. Complaint in an action by a stationary engineer to recover damages for injury to his hand while in the discharge of his duties, *held* not open to attack on the ground of being ambiguous and unintelligible, nor on the ground that it appeared therefrom that at the time he was injured he knew of the defect in the machinery which was the cause of the accident.—*Titus v. Anaconda Copper Min. Co.*, 583.

**Defective Appliances—Repairs After Injury—Evidence—Admissibility.**

46. Evidence of repairs on machinery after an accident was not admissible to show prior negligence, but was properly admitted as throwing light upon its condition when the injury to plaintiff's hand occurred.—*Titus v. Anaconda Copper Min. Co.*, 583.

**Defective Machinery—Vice-principal—Erroneous Information by—Assumption of Risk.**

47. Plaintiff having been informed by defendant's foreman—its vice-principal—that if any defect existed in the stationary engine which he was employed to run, it was the fault of the loose condition of a certain spring, whereas proper investigation would have disclosed that the defect was due to another cause, he had a right to rely upon such information and was not therefore chargeable with assumption of risk in attempting to remedy the supposed defect by tightening the spring, in doing which he was injured.—*Titus v. Anaconda Copper Min. Co.*, 583.

**Vice-principal—Ordering Servant into Dangerous Place—Contributory Negligence.**

48. Where a foreman stated to an engineer upon going on shift that if the engine missed, the trouble lay in a loose tension spring, the information thus imparted was tantamount to an order to tighten it while the engine was in motion, and the rule applied that where a servant is ordered into a situation of danger by the master, and in obeying the command the former is injured, he is not as a matter of law chargeable with contributory negligence, unless the danger was so glaring that no prudent man would have done the thing even under orders.—*Titus v. Anaconda Copper Min. Co.*, 583.

**PERSONAL PROPERTY.**

See, also, Contracts.

**Trusts—Creation.**

1. A trust concerning personal property may be created in parol.—*Mantle v. White*, 234.

**PLEADING AND PRACTICE.**

**Will Contest—Undue Influence—Sufficiency of Pleading.**

1. The allegation of undue influence in a statement of contest of a proposed will need not specify with particularity the entire details of the manner in which such influence was exercised; if ultimate facts are alleged from which the legal conclusion of undue influence fairly follows, the pleading is sufficient to support proof.—*Murphy v. Nett*, 38.

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**Specific Performance—Deed—Tender—Complaint—Sufficiency.**

2. In an action to enforce specific performance, failure on the part of plaintiffs to tender the deed with the complaint did not render the pleading objectionable, it having been alleged that an offer to perform had been made and refused and that plaintiffs were willing and stood ready to comply with the contract on their part.—*Lowery v. Cole*, 64.

**Same—Complaint—Sufficiency—Compensation—Presumptions.**

3. In an action for the specific performance of a contract for the sale of real property it is not necessary for plaintiff to allege that he has no adequate remedy at law; the presumption attaching that he has suffered detriment which is incapable of compensation in damages.—*Lowery v. Cole*, 64.

**Same—Complaint—Sufficiency—Injunction *Pendente Lite*.**

4. The fact that the complaint seeking specific performance of a contract failed to allege that defendant was insolvent did not render the court's action in granting the injunction erroneous; the pleading having been verified upon knowledge, the requirements of section 6644, Revised Codes, were met.—*Lowery v. Cole*, 64.

***Pendente Lite*—Insufficiency of Complaint—Conclusions.**

5. The complaint in a suit to set aside a judgment and vacate the sheriff's sale had to satisfy it, which alleged that the claim forming the basis of the judgment was a "pretense and fraudulent," and "in fraud of the rights" of plaintiffs, but did not set forth the facts upon which the charges of wrongdoing were grounded, was insufficient under section 6532, Revised Codes, and therefore did not justify the court in granting an injunction *pendente lite* against execution and delivery of the sheriff's deed.—*Brandt v. McIntosh*, 70.

**Corporations—Duty of Stockholders Before Bringing Action—Complaint—Insufficiency.**

6. Before stockholders may have recourse to a court of equity for redress of their grievances as to corporate affairs, they must first exhaust their remedy within the corporation itself; hence the complaint mentioned in paragraph 5 above, was insufficient for failing to allege that plaintiffs were minority stockholders; that a demand had been made upon and refusal by the board of directors, or why a demand would have been useless.—*Brandt v. McIntosh*, 70.

**Same.**

7. An allegation of demand upon the president and secretary (directors) of a corporation for a redress of grievances of minority stockholders is insufficient in the absence of a statement showing the number constituting the board of directors.—*Brandt v. McIntosh*, 70.

**Same.**

8. The complaint referred to in the foregoing paragraphs was deficient, also, in that while alleging wrongdoing by the officers of the corporation in neglecting to effect a redemption of its property sold at the sheriff's sale sought to be vacated, it omitted to aver that the officers had funds, or the means of obtaining them, with which to do so.—*Brandt v. McIntosh*, 70.

**Specific Performance—Real Property—Oral Contract of Sale—Complaint—Misjoinder of Causes of Action.**

9. Complaint in a suit to enforce specific performance of a contract of sale of real property, examined, and held not to disclose an alleged misjoinder, in that a cause of action based upon adverse possession for more than ten years was improperly joined with one for specific performance; the allegations therein germane to a claim of title by prescription having been pertinent to, and not inharmonious with, the prayer for specific performance, and the pleading as a whole inconsistent with a claim of legal title.—*Wright v. Brooks*, 99.

**Substitution of "Defendant" for "Plaintiff"—Waiver of Defect, How.**

10. An inadvertent substitution of the word "defendant" for "plaintiff" in the complaint does not render the pleading insufficient, but subject to special demurrer on the ground of uncertainty, which defect is waived by answering to the merits.—*Ivanhoff v. Teale*, 115.

**Contracts—Performance—Sufficiency of Pleading.**

11. Under section 6572, Revised Codes, performance by plaintiff of his contract was sufficiently alleged by his statement that "defendant (inadvertently substituted for "plaintiff") actually completed all of the work and labor to be by him performed under said contract and did all of the things in said contract of him required to be done."—*Ivanhoff v. Teale*, 115.

**Trial—Theory of Case—Conclusiveness.**

12. The theory upon which a case was tried in the district court with the acquiescence of the parties is binding upon them on appeal; hence, the court may not be put in error for any action during its course, even though such theory was wholly erroneous, unless timely objection was made thereto.—*Raiche v. Morrison*, 127.

**Judgments—Pleading—"Duly Given or Made"—Burden of Proof.**

13. While under section 6571, Revised Codes, a party may plead a judgment by the abbreviated allegation that it has been "duly given or made," he is not thereby relieved of the burden of proving jurisdictional facts if the allegation is controverted.—*Miller v. Miller*, 150.

**Same—Justice's Courts—Presumptions.**

14. The legal presumptions which may be indulged in favor of courts of record have no application to justice's courts, but the jurisdictional facts must be made to appear.—*Miller v. Miller*, 150.

**Personal Injuries—Pleadings—Reply—When Unnecessary.**

15. Where the complaint in an action by a passenger against a street-car company alleged, *inter alia*, that a telegraph pole, with which plaintiff collided while riding on the footboard of a crowded car, had been placed within a distance of less than four feet from the track, the affirmative allegation in the answer that such pole was not less than four feet and one inch away from the track did not constitute new matter but was the equivalent of a direct denial, requiring no reply. *Previsich v. Butte Electric Ry. Co.*, 170.

**Pleading and Proof—Immaterial Variance.**

16. Between an allegation in the complaint that the telegraph pole with which plaintiff came in collision while standing upon the footboard of a crowded street-car was placed at a distance of less than four feet from the track, and evidence that it was within dangerous proximity to the track, there was not such variance as to preclude recovery.—*Previsich v. Butte Electric Ry. Co.*, 170.

**Election Contest—Statement—Verification—Sufficiency.**

17. A verification attached to the statement of an election contest in form substantially the same as that required for a pleading in a civil action was sufficient.—*Curry v. McCaffery*, 191.

**New Trial—Mode of Procedure.**

18. One intending to move for a new trial upon any ground other than those mentioned in the first four subdivisions of section 6794, Revised Codes, may, under section 6795, do so either upon the minutes of the court or a bill of exceptions; if he have several grounds, he may select one method for one ground of his motion, and another for the remaining ground or grounds.—*Moore v. Butte Electric Ry. Co.*, 214.

**Pleadings—Evidence—Estoppel.**

19. Where plaintiff specifically denied allegations in defendant's answer, he may not on appeal rely upon the latter's pleading to supplement his own insufficient showing.—*Mantle v. White*, 234.

**Water Rights—Adverse Claims—Complaint—Sufficiency.**

20. The complaint in an action to determine conflicting claims to a water right, alleging that plaintiff was the owner of an undivided one-half interest in said right and that defendant claimed an interest therein adverse to that of plaintiff, but that such claim was without right, was sufficient to put the defendant upon his defense.—*Bennett v. Quinlan*, 247.

**Corporations—National Banks—Receivers—Stockholder's Action—Demand—Complaint.**

21. The rule that to entitle a stockholder to prosecute an action for redress of an injury to the corporation, as distinguished from one which he himself has suffered, he must allege that he has made demand upon the corporate authorities (or the receiver in charge) to act or make it apparent that a demand upon them (or him) would have been useless, is applicable to national banks; in case of such a corporation he must allege demand upon the board of directors, the receiver or the controller of the currency.—*Moss v. Goodhart*, 257.

**Evidence—Complaint—Insufficiency—When Treated as Amended.**

22. Where evidence is admitted, without objection, in aid of a fact necessary to state a cause of action but not alleged in the complaint, the pleading will, after judgment, be treated as amended to admit such proof.—*Moss v. Goodhart*, 257.

**Personal Injuries—Mining Claims—Unguarded Shafts—Infants—Contributory Negligence—Complaint.**

23. Contributory negligence may not be inferred, as a matter of law, from the acts of a child seven years old; hence the rule that plaintiff in a personal injury action, who by his complaint shows that a proximate cause of his injury was an act of his own, is barred of recovery unless he also shows that he was exercising ordinary care and circumspection at the time of the accident, has no application where the injured party was an infant of the age above mentioned.—*Conway v. Monidah Trust*, 269.

**Same—Complaint—Sufficiency.**

24. Conceding that the rule of pleading referred to in paragraph 23, *supra*, is applicable in an action where plaintiff is a minor of the age of seven years, it was met by the allegations of plaintiff's age; that at the time he fell into a shaft on defendant's mining claim, left unguarded (contrary to the provisions of section 8535, Revised Codes), it was dusk; that he was ignorant of the existence of the shaft, and engrossed in gathering wild flowers growing on the edge of said shaft; that he was using due care and prudence, and was without contributing fault and carelessness on his part in doing what he did.—*Conway v. Monidah Trust*, 269.

**Special Damages—Pleading Necessary.**

25. Special damages due to defendant's withholding property sought to be regained by the seller because of breach of contract by the buyer, not having been specially pleaded, were improperly awarded.—*Cook-Reynolds Co. v. Chipman*, 289.

**Subrogation—Complaint.**

26. To entitle a surety company to subrogation to the right of action which a county had against a bank for the recovery of money paid under a mistake as to its liability for the wrongdoing of an officer, the complaint must show that between it and the bank, the latter should in equity and good conscience bear the loss.—*American Bonding Co. v. State Savings Bank*, 332.

**Personal Injuries—Contributory Negligence—Complaint—Sufficiency.**

27. *Held*, that the plaintiff in an action to recover damages under section 5248, Revised Codes, need not allege in his complaint that the

injury sustained was caused "without contributing negligence on his part," such negligence being matter of defense to be asserted and shown by defendant employer unless made apparent by plaintiff's own pleading or proof.—*Melzner v. Raven Copper Co.*, 351.

**Complaint—Insufficiency—Mode of Attack.**

28. For purposes of attack on a complaint for insufficiency, a motion for judgment on the pleadings, an objection to the introduction of evidence, and a motion for nonsuit raise only such questions as arise upon a general demurrer.—*Daily v. Marshall*, 377.

**Corporations—Directors—Annual Reports—Failure to Make—Complaint.**

29. One who seeks to hold directors of a corporation liable for failure to comply with the provisions of section 3850, Revised Codes, as amended (Laws 1909, Chap. 140), relative to filing the annual report therein specified, must allege facts and circumstances clearly showing that the liability has attached, nothing being presumed in favor of the pleader.—*Daily v. Marshall*, 377.

**Pleadings—Construction—Implication.**

30. Whatever is necessarily implied or reasonably to be inferred from an allegation in a pleading is to be taken as directly averred.—*Daily v. Marshall*, 377.

**Personal Injuries—Contributory Negligence—Complaint—Sufficiency.**

31. The complaint in an action against a city charging that the proximate cause of plaintiff's injuries was defendant's negligence in leaving unguarded an excavation in one of its streets into which he fell, was not open to attack on the ground that though it appeared from the allegations therein that the accident was due to his own act, it failed to state facts exculpating him from the imputation of contributory negligence in acting as he did.—*Nilson v. City of Kalispell*, 416.

**Refusal to Strike—Error and Appeal.**

32. Reversible error may not be predicated upon a refusal to strike a so-called affirmative defense which in reality was no more than a denial in affirmative form.—*Wallace v. Weaver*, 437.

**Slander—Complaint—Amendment During Trial—When Proper.**

33. Amendment of complaint in an action for slander, by changing the statement of the slanderous words from the third to the second person, permission to make which was asked at commencement of trial, was properly allowed, the change wrought by it not having introduced into the pleading a charge of a different slander at another time and place, and the amendment having amounted to no more than the correction of a mistake therein as originally drawn.—*Downs v. Cassidy*, 471.

**Elections—Statement of Contest—Conclusions.**

34. An allegation in the statement of contest that contestee's name was not rightfully on the official ballot was not only a bare conclusion of the pleader, but did not, under section 7234, Revised Codes, constitute a ground of contest.—*Stephens v. Nacey*, 479.

**Same—Statement of Contest—Insufficiency—Irregularities—Prejudice.**

35. Alleged malconduct on the part of election judges in omitting to certify to the number and names of the persons who voted, and the names of candidates and the number of votes received by each, constituted an irregularity which, in the absence of facts from which it might be inferred that contestee suffered prejudice, was insufficient to warrant rejection of the vote cast at the particular polling-place.—*Stephens v. Nacey*, 479.

**Same—Statement of Contest—Fraud—Sufficiency.**

36. An allegation in a statement of contest that the election judges were guilty of malconduct in "that they pretended and represented and returned" to the board of canvassers that a certain number of votes

had been cast for contestee at a particular polling-place, "whereas in truth and in fact" no votes had been cast for him at such place, if intended to charge fraud on the part of the election judges, *held*, to state a cause of action, though perhaps open to special demurrer.—*Stephens v. Nacey*, 479.

Same—Statement of Contest—Sufficiency.

37. The allegation that contestee received a certain number of votes at a polling-place cast by persons who at the time were not residents of the state "but lived upon and within an Indian reservation, in said county, and were not in any respect qualified electors," *held* to state a ground of contest.—*Stephens v. Nacey*, 479.

Statutes of Limitation—Pleading.

38. A statute of limitation must be pleaded by one seeking to take advantage of it.—*Cullen v. Western M. & W. T. Co.*, 513.

Trial—Pleadings—Amendments—Discretion.

39. After issue joined, the matter of permitting amendments to pleadings is one addressed to the sound judicial discretion of the trial court, and before the supreme court will hold a refusal to leave to amend to have been error, appellant must show an abuse of such discretion.—*Cullen v. Western M. & W. T. Co.*, 513.

Same.

40. Where appellant had made no showing whatever in support of his application for leave to amend his answer and offered no excuse for delay in making it for about four months and a half after filing it and until the cause was before the court for argument, the district court may not be said to have abused its discretion in refusing the leave.—*Cullen v. Western M. & W. T. Co.*, 513.

## POLICE OFFICERS.

See, also, *Mandamus*.

Wrongful Discharge—Action for Damages—Nonsuit, When Proper.

1. Plaintiff, in an action against the mayor of a city personally, charged that he had been damaged by the loss of his salary in consequence of his dismissal and subsequent preclusion from the police force, contrary, to the provisions of the Metropolitan Police Law. His evidence showed that upon his restoration to office, about eighteen months thereafter, he presented his claim for accrued salary, which was rejected for some reason not made apparent, but did not disclose that the city, though liable for his salary during the entire period of unlawful preclusion, could not be made to respond. *Held*, that an order of nonsuit was proper, no causal connection between the unlawful preclusion and loss of emoluments being made to appear.—*Bailey v. Edwards*, 363.

Metropolitan Police Law—Police Officers—Appointment to Permanent Service—Duty of Mayor.

2. *Held*, that under the Metropolitan Police Law it is obligatory upon the mayor of a city to appoint one to permanent service on the police force who, after service for the probationary term of six months, has demonstrated his fitness for the position; *held*, further, that probationers, being members of the force, may be removed only upon charges made and trial had as provided in sections 5 and 6 of the Act (Rev. Codes, secs. 3308, 3309).—*State ex rel. Bennetts v. Duncan*, 447.

Same—Appointment to Permanent Service—Official Oath.

3. The permanent appointment of a probationer after completion of the probationary term of six months is not to be construed as the beginning of a new term of service but as a confirmation of the original appointment; therefore, having subscribed the official oath when first appointed, it is unnecessary that a new oath be taken and sub-

scribed upon receiving permanent appointment.—State ex rel. Bennetts v. Duncan, 447.

POLICE POWER.

See Cities and Towns, 1-4.

Owner of real property holds same subject to regulation under,—see Real Property, 1.

POSTPONEMENT.

See District Courts, 7.

POWERS.

Of counties, relative to public printing,—see Counties, 3.

Of county commissioners, as to creation of new counties,—see Counties, 10, 11.

Of cities and towns, with respect to compelling street railways to light tracks,—see Cities and Towns, 1-4.

PRESUMPTIONS.

Adjudication of rights of parties defendant in water right suits,—see Res Adjudicata, 2.

Record on appeal from new trial order,—see New Trial, 4.

Specific Performance—Pleading—Remedy at Law.

1. In an action to compel specific performance of a contract of sale of real property it is not necessary for plaintiff to allege that he has no adequate remedy at law; the presumption attaching that he has suffered detriment incapable of compensation in damages.—Lowery v. Cole, 64.

Justices' Courts—Jurisdiction.

2. The legal presumptions which may be indulged in favor of judgments of courts of record have no application to justices' courts.—Miller v. Miller, 150.

Real Property—Creation of Trust in.

3. From the fact that the subject of an alleged trust was real property, the presumption arises that the creation of it was evidenced by a writing as required by the statute of frauds.—Mantle v. White, 234.

Judgments—Joint Interest—Extent of Each Owner.

4. The presumption, if any, that where parties were by decree awarded a joint interest, without specifically fixing the extent of the interest of each, they were each entitled to an equal share therein, was not conclusive, as between their successors in interest who had full knowledge of the extent of the rights of their predecessors, but *prima facie* only. Bennett v. Quinlan, 247.

Equity—Error in Admitting Evidence.

5. On appeal in an equity case the presumption obtains that the trial court, in arriving at its decision, disregarded any erroneously admitted evidence, unless it appears that it influenced the decision in a material aspect.—Moss v. Goodhart, 257.

Streets—Safety—Presumptions.

6. Though a traveler on a city street may not close his eyes to an obvious danger, he is not obliged to make a special effort to discover defects; he may presume that the thoroughfare is in an ordinarily safe condition.—Nilson v. City of Kalispell, 416.

PRINTING CONTRACTS.

Constitutionality of statutes providing for county printing,—see Counties, 3-8.

## RES ADJUDICATA.

## PROBATE LAW.

See Executors and Administrators; Wills.

## PROFITS.

Evidence of past profits, admissibility,—see Evidence, 10.

## PROHIBITION.

Premature Application—Refusal of Writ.

1. Writ of prohibition to restrain a district court from assuming jurisdiction of a proceeding arising out of a suit for divorce, alleged to have been erroneously transferred to it on change of venue, will not issue where relator has failed to exhaust his remedies in said court before applying to the supreme court for relief.—*State ex rel. Scollard v. District Court*, 284.

## PROMISSORY NOTES.

See Interest, 1.

## PUBLIC FUNDS.

Interest on, who entitled thereto,—see Cities and Towns, 7.

## RAILROADS.

See Street Railroads; Personal Injuries, 4-13, 29-32, 40-42.

## REAL PROPERTY.

Breach of contract of sale, by purchaser—Recovery back of part payment,—see Contracts, 2, 11-28.

Creation of trust in,—see Trusts, 1-3.

Option contract,—see Contracts, 4, 5.

Power of partner to convey firm realty,—see Partnership, 2.

Refusal to convey,—see Specific Performance.

Regulations—Police Power.

1. The owner of real property holds it subject to such reasonable control and regulation by the state, under its police power, as the legislature deems necessary for the prevention of injury to the rights of others and the security of the public health and welfare.—*Conway v. Monidah Trust*, 269.

## RECEIVERS.

Demand upon, by stockholder, in action against corporation,—see Corporations, 6.

## RECORD.

On appeal,—see Appeal and Error, 12, 13, 15, 23, 24, 33.

On appeal from new trial order, presumptions,—see Appeal and Error, 15.

## RES ADJUDICATA.

See, also, Mandamus, 1.

Parol Evidence—Admissibility.

1. Where, because of the loss or destruction of the record in a water right suit (with the exception of the findings and decree), it was impossible to determine whether the respective rights of two codefendants



had been adjudicated *inter sese*, the trial court in a subsequent action between their successors properly admitted parol evidence to ascertain what rights had been determined in such action.—Bennett v. Quinlan, 247.

**Determination of Rights of Defendants *Inter Sese*—Presumptions.**

2. The provision of section 4852, Revised Codes, that in a water right suit the plaintiff may make any and all persons who have diverted water from the stream in controversy parties, and the court may in one judgment settle the rights of all of them in one decree, being permissive only, there was no presumption that the respective interests of joint owners in an undivided water right had been adjudicated *inter sese* in a suit in which their predecessors were codefendants, in the absence of a showing to that effect upon the face of the decree or the judgment-roll.—Bennett v. Quinlan, 247.

**RESCISSION.**

See Contracts, 14, 22.

**RES GESTAE.**

See Evidence, 6, 22.

**RES IPSA LOQUITUR.**

Applicability of doctrine,—see Personal Injuries, 30, 31.

**RULES.**

Of private parties in derogation of statute, inadmissibility of evidence,—see Evidence, 14.

Of supreme court, disregard of,—see Appeal and Error, 14.

**SALES.**

See Contracts; Real Property; Specific Performance.

**SLANDER.**

**Complaint—Amendment—When Proper.**

1. Amendment of complaint in an action for slander, by changing the statement of the slanderous words from the third to the second person, permission to make which was asked at commencement of trial, was properly allowed, the change wrought by it not having introduced into the pleading a charge of a different slander at another time and place, and the amendment having amounted to no more than the correction of a mistake therein as originally drawn.—Downs v. Cassidy, 471.

**Evidence—Admissibility.**

2. Slanderous words spoken of plaintiff by defendant either before or after the date of the charge laid in the complaint are admissible to show malice.—Downs v. Cassidy, 471.

**Wealth of Defendant—Evidence—Admissibility.**

3. Evidence of the wealth of defendant in an action for slander is admissible, it being an element of aid in determining his social rank and influence in society, thus tending to show the extent of the injury suffered by plaintiff; where punitive damages are allowed, such evidence is of assistance in the determination of the extent of the punishment to be inflicted upon defendant.—Downs v. Cassidy, 471.

**Attorneys—Misconduct—What Does not Constitute.**

4. Evidence of defendant's financial condition having been a proper matter of inquiry, the remark of counsel for plaintiff in his opening

statement that defendant would be shown to be a person of wealth may not be said to have been such misconduct as to warrant the granting of a new trial, even though no evidence whatever touching the subject was later offered by him.—*Downs v. Cassidy*, 471.

**Excessive Damages—Review.**

5. The amount of damages awarded in an action for slander is a matter peculiarly within the discretion of the jury after taking into consideration all the circumstances appearing from the evidence, and its verdict (\$1,000 in this instance), claimed to be excessive, should not be disturbed unless the sum awarded is so large as to raise a presumption that it was the result of a gross error or of undue motives.—*Downs v. Cassidy*, 471.

**SPECIFICATION OF ERRORS.**

Disregard of supreme court rule relating to,—see Appeal and Error, 14.

**SPECIFIC PERFORMANCE.**

**Complaint—Sufficiency—Injunction *Pendente Lite*.**

1. The fact that the complaint seeking specific performance of a contract, under the terms of which defendant agreed *inter alia* to take over certain lots owned by plaintiffs in discharge of a judgment held by her, and asking a preliminary injunction restraining conduct on defendant's part which, but for the restraint, would result in a condition rendering a final decree in favor of plaintiffs ineffective, failed to allege that defendant was insolvent, did not render the court's action in granting the injunction erroneous; the pleading having been verified upon knowledge, the requirements of section 6644, Revised Codes, were met.—*Lowery v. Cole*, 64.

**Realty—Deed—Tender—Complaint—Sufficiency.**

2. In an action to enforce the specific performance of the contract referred to in paragraph 1, *supra*, failure on the part of plaintiffs to tender the deed with the complaint did not render the pleading objectionable, it having been alleged that an offer to perform had been made and refused and that plaintiffs were willing and stood ready to comply with the contract on their part.—*Lowery v. Cole*, 64.

**Same—Complaint—Sufficiency—Compensation—Presumptions.**

3. In an action for the specific performance of a contract for the sale of real property it is not necessary for plaintiff to allege that he has no adequate remedy at law, the presumption attaching that he has suffered detriment which is incapable of compensation in damages.—*Lowery v. Cole*, 64.

**Same—Injunction—Power of Court.**

4. A court of equity, having once assumed jurisdiction of an action for specific performance for the sale of land, may, as in any other action, make use of all the instrumentalities at its disposal, including injunction, to preserve the *status quo* until the controversy can be determined on the merits.—*Lowery v. Cole*, 64.

**Same—Oral Contract of Sale—Complaint—Misjoinder of Causes of Action.**

5. Complaint in a suit to enforce specific performance of a contract of sale of real property, examined, and *held* not to disclose an alleged misjoinder, in that a cause of action based upon adverse possession for more than ten years was improperly joined with one for specific performance; the allegations therein germane to a claim of title by prescription having been pertinent to and not inharmonious with the

prayer for specific performance, and the pleading as a whole inconsistent with a claim of legal title.—Wright v. Brooks, 99.

**Same—Possession Under Contract of Sale—Nature of Holding.**

6. One possessing land under a contract of sale holds, not adversely, but in subordination to, the legal title.—Wright v. Brooks, 99.

**Same—Laches—Presumptions.**

7. While laches may arise from an unexplained delay short of the period fixed by the statute of limitation, it will not be presumed from such delay alone.—Wright v. Brooks, 99.

**Same—Possession and Improvements by Vendee—Effect on Holder of Legal Title.**

8. Specific performance of an oral contract for the sale of real estate may be decreed where possession thereunder, taken by the vendee with the vendor's knowledge or consent, is followed by improvement of the property, even though no part of the purchase price has been paid; in such a case, where the vendee has made repeated efforts, and stands ready, able and willing to pay, the vendor holds the legal title in trust for the vendee.—Wright v. Brooks, 99.

**Same—Statute of Limitation Commences to Run, When.**

9. The statute of limitation in a case such as that mentioned in paragraph 8, *supra*, does not commence to run until the vendor has in some manner disavowed his trust.—Wright v. Brooks, 99.

**Same—Laches—Statute of Limitation—General Demurrer.**

10. The complaint in a suit for specific performance brought over thirteen years after the making of an oral agreement to sell real property, which, while alleging that defendant had been requested to convey but had refused to do so, did not state when such demand was refused, *held*, not vulnerable to a general demurrer upon the alleged ground that the pleading disclosed upon its face that the suit was barred by the statute of limitation.—Wright v. Brooks, 99.

**Same—Laches not Alone Sufficient to Defeat.**

11. A vendee in possession of realty is not barred from specific performance by mere delay in bringing suit; he may rest in security until his title or right of possession is attacked.—Wright v. Brooks, 99.

**Same—Partnership—One Partner Acting for Copartner—Evidence—Sufficiency.**

12. Evidence *held* sufficient to justify a finding that the person who entered into an oral agreement to sell real property to plaintiff in an action for specific performance acted for himself as well as in behalf of his copartners.—Wright v. Brooks, 99.

**Same—Substantial Improvements—Evidence—Sufficiency.**

13. Where the purchase price of two lots orally agreed upon between the parties was \$200, evidence that improvements valued at from six to seven hundred dollars had been placed thereon was a sufficient showing of substantial and permanent improvement to authorize specific performance.—Wright v. Brooks, 99.

**Same—Payment of Taxes by Defendant—Effect.**

14. Defendant, in a suit for the specific performance of a contract of sale of realty who was found to have been at fault for delay in performance, was not entitled to prevail because of the fact that he had paid the taxes and other charges upon the property during plaintiff's occupancy, nor to reimbursement as a condition precedent to the relief granted plaintiff; the court having decreed, however, that the latter pay interest on the purchase price for the entire

period since the date of the agreement, defendant was not in a position to complain.—Wright v. Brooks, 99.

#### STATUTE OF FRAUDS.

See Contracts, 1; Fraudulent Conveyances, 1-3; Trusts, 2.

#### STATUTE OF LIMITATIONS.

**Real Property—Oral Contract of Sale—Refusal to Convey.**

1. Where a purchaser of real property under an oral contract takes possession, makes improvements, *etc.*, the statute of limitations does not commence to run until the vendor has in some manner disavowed his trust.—Wright v. Brooks, 99.

**Same—Specific Performance—Laches—General Demurrer.**

2. The complaint in a suit for specific performance brought over thirteen years after the making of an oral agreement to sell real property, which, while alleging that defendant had been requested to convey but had refused to do so, did not state when such demand was refused, *held*, not vulnerable to a general demurrer upon the alleged ground that the pleading disclosed upon its face that the suit was barred by the statute of limitation.—Wright v. Brooks, 99.

**Same—Presumptions.**

3. While laches may arise from an unexplained delay short of the period fixed by the statute of limitations, it will not be presumed from such delay alone.—Wright v. Brooks, 99.

**City Treasurer—Failure to Pay Over Interest on Public Funds.**

4. Subdivision 1 of section 6449, barring an action upon a liability created by statute if not brought within two years, *held*, not to apply to an action against a city treasurer to recover interest received by him on deposits of city funds which he failed to turn over to his principal.—City of Butte v. Goodwin, 155.

**Same.**

5. A city treasurer who failed to turn over interest received on public funds was guilty of a breach of his implied promise, as trustee of such funds to do so, and not of a breach of a contract in writing—his official bond; hence an action to recover such interest, brought more than four years after the conclusion of the treasurer's term of office, was barred under subdivision 3 of section 6447, Revised Codes.—City of Butte v. Goodwin, 155.

**Nonsuit—Duty of Court.**

6. Where upon the trial of a cause it was made apparent that the action was barred under the statute of limitations, it was the duty of the court to grant a motion for nonsuit.—City of Butte v. Goodwin, 155.

**Tax Deeds—Setting Aside—Pleading.**

7. Section 2654 as amended (Laws 1909, Ch. 50), providing that any right of action to set aside a tax issued theretofore shall be barred unless suit be commenced within two years from the passage of the act, being a statute of limitations, must be pleaded in the answer by one seeking to take advantage of it.—Cullen v. Western M. & W. T. Co., 513.

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## STATUTES AND STATUTORY CONSTRUCTION.

## Master and Servant—Death of Servant—Right of Action.

1. *Held*, that section 6486, Revised Codes, in providing that when the death of a person is caused by the "wrongful act or neglect of another"



his heirs or personal representatives may maintain an action for damages, *etc.*, implies actionable wrong or negligence toward the decedent and not toward his surviving wife and children; *held*, further, that it did not create a cause of action in their favor, to which the defendant could not interpose the defenses of contributory negligence, assumption of risk, *etc.*, but that their right to recover damages depended upon whether decedent, had he survived the injuries, could have done so.—*Melville v. Butte-Balaklava C. Co.*, 1.

**Construction.**

2. Where general words follow particular and specific ones, the former must be construed to mean things of the kind particularized by the latter.—*Helena Light etc. Co. v. City of Helena*, 18.

**Statutes—Adoption from Other States—Construction.**

3. Adoption of a statute from another state after construction by its highest court carries with it the construction thus placed upon it.—*Miller v. Miller*, 150.

**Corporations—Annual Report—Strict Construction of Statute.**

4. Chapter 140, Laws of 1909, is penal only in the sense that it creates a liability not known to the common law, and therefore must be strictly construed.—*Daily v. Marshall*, 377.

**Amendatory Statutes—Effect on Pending Proceedings.**

5. If an amendatory Act changes the very basis of a right or affects the jurisdiction, and provision is not made for a saving clause, proceedings initiated under the old law may not be completed under the new.—*State ex rel. Jacobson v. Board*, 531.

**STENOGRAPHERS.**

Reading from transcript of notes,—see *Evidence*, 24.

**STOCK AND STOCKHOLDERS.**

See *Corporations*.

**STREET RAILROADS.**

Crowded cars, duty of carrier,—see *Personal Injuries*, 8-10.

Power of cities to require lighting of tracks,—see *Cities and Towns*, 1-4.

Removing and replacing tracks to enable city to lay sewer—Invalidity of contract,—see *Cities and Towns*, 5, 6.

Rights of travelers on bridge occupied by,—see *Personal Injuries*, 12.

**STREETS.**

Ordinarily safe condition presumed,—see *Personal Injuries*, 36.

**SUBROGATION.**

See *Equity*, 2; *Suretyship*, 1-4.

**SUPREME COURT.**

See, also, *Appeal and Error*.

**United States Supreme Court—Decisions—Conclusiveness.**

1. The decision of the supreme court of the United States on a federal question is conclusive upon a state supreme court.—*Quong Wing v. Kirkendall*, 16; *Chicago, M. & St. P. Ry. Co. v. Swindhurst*, 119.

## SURETYSHIP.

Official bond, nature of undertaking,—see Contracts, 10.

## Equity—Subrogation—Nature of Remedy.

1. The doctrine of subrogation is invoked by courts of equity to the end that justice may be done as nearly as possible, its application depending upon the circumstances of each particular case.—*American Bonding Co. v. State Savings Bank*, 332.

## Liability—Subrogation.

2. Where a surety company had to make good a county's loss occasioned by the misconduct of one of its officers in issuing fictitious jurors' certificates which had been purchased by a bank and paid by the county, it was incumbent upon the company to show in its complaint, in order to entitle it to subrogation to the right of action which the county had against the bank for the recovery of the money paid under a mistake as to its liability, that, as between it and the bank, in equity and good conscience the latter should bear the loss. *American Bonding Company v. State Savings Bank*, 332.

## Same—Complaint—Insufficiency.

3. *Held*, under the above rule, that the complaint which did not charge negligence or wrongdoing on the part of the bank in purchasing the fraudulent certificates, but rather disclosed that it acted in good faith in the premises and followed an established custom in dealing in them, even though they did not bear the impress of the official seal as required by law, failed to show such a state of facts as to entitle the surety company to be subrogated to the right of the county to recover the money paid to the bank.—*American Bonding Co. v. State Savings Bank*, 332.

## Liability—Subrogation—Rights of Parties.

4. *Semble*: It would seem that a bank which cashed fraudulent county certificates would, in the event the county had refused to pay them, have had a right of action against the surety company which for a consideration undertook to be responsible for the official misconduct of the person issuing the same; therefore, the company may not be said to have had a cause of action against the bank to recover what it was obliged to pay.—*American Bonding Co. v. State Savings Bank*, 332.

## SURPLUSAGE.

Information charging gaming,—see Criminal Law, 1.

## SURPRISE.

Postponement of trial, discretion,—see District Courts, 7.

## TAX DEEDS.

## Tax Sales—Mistakes in Assessment—Effect on Deed.

1. Under the rule that when land is sold as the property of a particular person for taxes which have been correctly imposed upon it, no misnomer or other mistake relating to the ownership thereof affects the sale or renders it void or voidable, a tax deed which recited that the property in question was sold for taxes upon an assessment to "*American Mining Co. et al.*," was not void, the mistake of the assessor in not assessing to all the owners, if known to or readily ascertainable by him, having been in the nature of an irregularity or informality only.—*Cullen v. Western Mtg. etc. Co.*, 513.

## Failure to Recite Year of Assessment—Effect.

2. Where from recitals in a tax deed the year of the assessment of realty for the nonpayment of taxes on which it was sold was made ap-

parent indirectly, the fact that it contained no direct statement imparting such information did not render the deed void.—Cullen v. Western Mtg. etc. Co., 513.

**Sale Void, When.**

3. A sale of all the real property on which taxes were delinquent, at one time for a lump sum to the county, though belonging to various owners, was void, and therefore did not constitute a bar to a resale for delinquency the succeeding year.—Cullen v. Western Mtg. etc. Co., 513.

**Conclusiveness—Statutes—Construction.**

4. The clause of section 2654, Revised Codes, as amended (Laws 1909, Ch. 50), making a tax deed conclusive evidence of all proceedings leading up to its execution, refers to acts and proceedings required at the hands of the officers charged with duties in relation to assessment and taxation, and not to something necessary to be done by the applicant for the deed.—Cullen v. Western Mtg. etc. Co., 513.

**Application for Deed—Defective Affidavit.**

5. *Held*, that the affidavit filed by an applicant for a tax deed which showed a service of the notice of application by posting only, without any service upon any of the owners, and failed to aver that the premises were unoccupied so as to authorize posting (Pol. Code 1895, secs. 3895, 3896; Rev. Codes, secs. 2651, 2652), was jurisdictionally defective, and that a deed issued notwithstanding such defects in the affidavit—the basis of action by the treasurer in the premises—was void.—Cullen v. Western Mtg. etc. Co., 513.

**Setting Aside—Statutes—Limitations—Pleading.**

6. Section 2654 as amended (Laws 1909, Chap. 50), providing that any right of action to set aside a tax deed issued theretofore shall be barred unless suit be commenced within two years from the passage of the Act, being a statute of limitation, must be pleaded in the answer by one seeking to take advantage of it.—Cullen v. Western Mtg. etc. Co., 513.

**Same—Applicability of Statute—Actions—Technicalities.**

7. Where the sole aim of an action is to do away with a tax deed as a claim of title adverse to the plaintiff, it is an action "to set aside or annul" a tax deed so as to make the provision of section 2654, *supra*, applicable, even though it may be termed one to quiet title.—Cullen v. Western Mtg. etc. Co., 513.

**TAXES.**

Imposing tax upon interstate commerce, invalidity of statute,—see Constitution, 1.

Payment of, by defendant in suit for specific performance found at fault, no defense,—see Specific Performance, 14.

**TECHNICALITIES.**

See Appeal and Error, 27; Tax Deeds, 7.

**TENDER.**

See Contracts, 12; Specific Performance, 2.

**THEORY OF CASE.**

See, also, Appeal and Error, 17, 18, 25, 34.

**Instructions—When Properly Refused.**

1. An instruction unsupported by the pleadings or evidence, as well as contrary to the theory on which the party offering it tried the

case, may properly be refused.—*Melzner, Admr., v. Raven Copper Co.*, 351.

#### THREATS.

Admissibility,—see Criminal Law, 10, 11.

#### TRESPASSERS.

Rights of travelers on bridge used by street railways,—see Personal Injuries, 12.

Mining Claims—Liability of Owner.

1. Though a plaintiff infant was a technical trespasser upon defendant's mining claim, into an unguarded shaft on which he fell, the defendant's omission to comply with the requirement imposed upon him by section 8535, Rev. Codes, rendered him liable to damages for injuries suffered by the plaintiff.—*Conway v. Monidah Trust*, 269.

#### TRIAL.

See Amendments; Burden of Proof; Continuances; Cross-examination; Declarations; Discretion; Dismissal; District Courts; Evidence; Exceptions; Findings; Instructions; New Trial; Nonsuit; Objections; Pleading and Practice; Postponement; Theory of Case; Variance; Verdicts.

#### TRUSTS.

In Real Property—Creation—Insufficiency of Writing.

1. *Held*, that an instrument claimed by plaintiff to have created an express trust in real property in his favor, which neither indicated an intention on the part of the plaintiff to create a trust nor showed that defendant was accepting, or acknowledging the existence of, one, nor the purpose of its creation, nor what disposition defendant was to make of the property, was insufficient to constitute the latter a trustee as alleged.—*Mantle v. White*, 234.

Same—Presumptions—Statute of Frauds.

2. From the fact that the subject of an alleged trust was real property, the presumption arises that the creation of it was evidenced by a writing as required by the statute of frauds.—*Mantle v. White*, 234.

Same—Evidence—Pleading—Reply—Estoppel.

3. Plaintiff, having in his reply specifically denied allegations in the answer of defendant relative to the establishment of an express trust in realty, was not in position to rely upon defendant's pleading to supplement his own insufficient showing in that respect.—*Mantle v. White*, 234.

Personal Property.

4. A trust concerning personal property may be created in parol.—*Mantle v. White*, 234.

#### UNDERTAKINGS.

See Bonds.

#### UNDUE INFLUENCE.

See Wills, 1-3.

#### UNITED STATES SUPREME COURT.

Conclusiveness of decisions,—see Appeal and Error, 1.

VACANCIES.

Failure to take official oath, effect,—see Cities and Towns, 13.

In city council,—see Cities and Towns, 14-16.

VARIANCE.

Immaterial,—see Pleading and Practice, 16.

VENDOR AND PURCHASER.

See Contracts.

VERDICTS.

Excessive,—see Personal Injuries, 11, 38, 42; Slander, 5.

When Contrary to Law.

1. A verdict cannot be said to be contrary to law, unless the evidence is such that the jury may not find otherwise than in accordance with the theory of the instructions, and yet have ventured to do so.—*Previsich v. Butte El. Ry. Co.*, 170; *Melzner, Admr., v. Raven Copper Co.*, 351.

Verdict on Conflicting Evidence—Conclusiveness.

2. A verdict attacked on the ground of insufficiency of the evidence to sustain it will not be disturbed on appeal where the evidence is conflicting and where the court, after consideration of a motion for new trial, stamped the finding of the jury with its approval by denying the motion.—*Previsich v. Butte El. Ry. Co.*, 170.

Equity—General Verdict—Submission Erroneous.

3. In an equity case a general verdict should not be submitted to the jury.—*Moss v. Goodhart*, 257.

Joint Tort-feasors—Verdict as to One Only—Effect.

4. Where the verdict in an action for wrongful death brought jointly against a mine operator and a hoisting engineer under section 5248, Revised Codes, by which the former is made responsible for injuries to his employees under the maxim *respondeat superior*, was silent as to the engineer, the failure of the jury to find as to him was not a finding of non-negligence on his part, but should be regarded as no finding as to him.—*Melzner, Admr., v. Raven Copper Co.*, 351.

VERIFICATION.

Of statement of election contest, sufficiency,—see Pleading and Practice, 17.

VICE-PRINCIPALS.

See Personal Injuries, 47, 48.

WAIVER.

Of defect in pleading by answering to merits,—see Pleading and Practice, 10.

WATER AND WATER RIGHTS.

Adverse Claims—Complaint—Sufficiency.

1. The complaint in an action to determine conflicting claims to a water right, alleging that plaintiff was the owner of an undivided one-half interest in said right and that defendant claimed an interest therein adverse to that of plaintiff, but that such claim was without right, was sufficient to put the defendant upon his defense.—*Bennett v. Quinlan*, 247.

**Determination of Rights of Defendants *Inter Sese*—*Res Adjudicata*—Presumptions—Parties—Statutes.**

2. The provision of section 4852, Revised Codes, that in a water right suit the plaintiff may make any and all persons who have diverted water from the stream in controversy parties, and the court may in one judgment settle the rights of all of them in one decree, being permissive only, there was no presumption that the respective interests of joint owners in an undivided water right had been adjudicated *inter sese* in a suit in which their predecessors were codefendants, in the absence of a showing to that effect upon the face of the decree or the judgment-roll.—*Bennett v. Quinlan*, 247.

***Res Adjudicata*—Decree—Parol Evidence—Admissibility.**

3. Where, because of the loss or destruction of the record in a water right suit (with the exception of the findings and decree), it was impossible to determine whether the respective rights of two codefendants had been adjudicated *inter sese*, the trial court in a subsequent action between their successors properly admitted parol evidence to ascertain what rights had been determined in such action.—*Bennett v. Quinlan*, 247.

**Decree—Joint Interest—Presumptions.**

4. The presumption, if any, that where parties were by decree awarded a joint interest, without specifically fixing the extent of the interest of each, they were each entitled to an equal share therein, was not conclusive, as between their successors in interest who had full knowledge of the extent of the rights of their predecessors, but *prima facie* only.—*Bennett v. Quinlan*, 247.

**Violation of Decree—Nominal Damages.**

5. Though the violation of a water right decree may give rise to a proceeding in contempt, it is not sufficient to constitute a cause of action even for nominal damages, since one to whom such a right is decreed neither owns the water nor the channel of the stream out of which it is taken, but merely has the right to use the water when it is needed; and therefore the rule that in a case of trespass upon real property, strictly speaking, the plaintiff has a right of action for nominal damages, at least, has not any application.—*Wallace v. Weaver*, 437.

**Depositing Debris—Evidence as to Conditions on Adjoining Lands—When Inadmissible.**

6. In the absence of a showing that the conditions at the two places were similar, defendants' evidence that debris had not been deposited upon land situated above that of plaintiff, for damage to crops on which, because of defendants' wrongful use of water, plaintiff sought damages and injunctive relief, was improperly admitted.—*Wallace v. Weaver*, 437.

**Extent of Right of Prior Appropriator.**

7. A prior appropriator of all the water in a stream is entitled to the maximum flow when needed, and may not be limited to the average flow.—*Wallace v. Weaver*, 437.

WILLS.

**Contest of Probate—Pleading—Insufficiency—Harmless Error.**

1. Where in a will contest the jury, while making a finding as to testamentary incapacity, failed to find undue influence, though the statement of contest sought to set the instrument aside on both grounds, and the decree was based solely on the finding as made, the question whether the pleading sufficiently alleged undue influence, *held* immaterial.—*Murphy v. Nett*, 38.

**Undue Influence—Pleading—Sufficiency.**

2. The allegation of undue influence in a statement of contest of a proposed will need not specify with particularity the entire details of the manner in which such influence was exercised; if ultimate facts are alleged from which the legal conclusion of undue influence fairly follows, the pleading is sufficient to support proof.—Murphy v. Nett, 38.

**Same—What may Constitute.**

3. Demands and importunities may amount to undue influence, without being coupled with fraud, threats or misrepresentation; whether they do or not depending upon what they were, how persistently and under what circumstances they were employed, and whether the mind of the testator was so infirm as to be overpowered by them.—Murphy v. Nett, 38.

**Injustice of—Admissibility in Evidence—For What Purpose.**

4. Under the rule that, though the injustice or unreasonableness of a will is not alone sufficient to cause its rejection, it is a circumstance bearing upon the questions of testamentary capacity and undue influence, the facts that the testator's mother (contestant) had transferred all her real and personal property to him and that he knew this before he made his will, naming a sister his sole beneficiary, were properly admitted in evidence.—Murphy v. Nett, 38.

**Declarations of One of Several Beneficiaries—When Admissible.**

5. The rule that where there are two or more beneficiaries under a will having a common or several, but not joint, interest in its provisions, the declarations of one of them as to testamentary capacity or undue influence are inadmissible to affect its validity, has no application in a case where the only real beneficiary to be adversely affected by such declarations was declarant (proponent of the instrument), the others, to each of whom was left one dollar, having been beneficiaries in name only.—Murphy v. Nett, 38.

**Insanity—Invading Province of Jury—Expert Testimony—When not Objectionable.**

6. Where the validity of a will was attacked on the ground that at the time of its execution testator was insane,—contestee asserting that he then had a lucid interval, and contestant maintaining that his ailment did not permit of lucid intervals, the evidence showing that shortly before and soon after the date of the instrument he was shown to have been of unsound mind, dying ultimately of dementia,—rebuttal testimony by insanity experts that in their opinion testator could not have had a lucid interval at the time in question, *held*, not objectionable as invading the province of the jury.—Murphy v. Nett, 38.

**Same—Capacity to Make—Test—Instruction—Proper Refusal.**

7. While contractual capacity implies, *prima facie*, capacity to make a will, neither is a test for the other, and the presence or absence of one does not conclusively establish the presence or absence of the other; hence, an instruction in a will contest that a less degree of mind is required to execute a will than is necessary to execute a contract was properly refused.—Murphy v. Nett, 38.

**Evidence—Sufficiency.**

8. Where in a will contest there was ample evidence to sustain it and substantial evidence against its validity, the decree of the trial court will not be disturbed on appeal for alleged insufficiency of the evidence to sustain it.—Murphy v. Nett, 38.

## WITNESSES.

See, also, Cross-examination; Evidence.

Expert, invading province of jury,—see Evidence, 5.

## WORDS AND PHRASES.

## "Action"—

State ex rel. Bennetts v. Duncan, 451.

## "Actual" delivery—

Taylor v. Malta Mercantile Co., 350.

## "A majority of the whole number of the members elected"—(Rev. Codes, sec. 3263.)

State ex rel. Wilson v. Willis, 551.

## "A majority vote of the members"—(Rev. Codes, sec. 3236.)

State ex rel. Wilson v. Willis, 552.

## "Any such shaft"—(Rev. Codes, sec. 8535.)

Conway v. Monidah Trust, 281.

## "Bond," official—

City of Butte v. Goodwin, 167.

## "Cause of action" for tort—

Wallace v. Weaver, 442.

## "City or town"—(Laws 1911, p. 205.)

State ex rel. Powers v. District Court, 228 *et seq.*

## "Civil action"—

Bailey v. Edwards, 371.

## "Claims against estate"—

In re Williams' Estate, 330.

## "Connivance"—(Rev. Codes, sec. 3659.)

Farwell v. Farwell, 578.

## "Continued" change of possession—

Taylor v. Malta Mercantile Co., 350.

## "County,"—

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## "Defendant" for "plaintiff"—

Ivanhoff v. Teale, 117.

## "Demands and importunities"—

Murphy v. Nett, 52, 53.

## "Duly given and made"—Judgment—

City of Butte v. Goodwin, 154.

## "Exercising judicial functions"—(Rev. Codes, sec. 7203.)

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## "Fine"—(Const., Art. III, sec. 20.)

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## "Local" law—

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## "Mandamus"—

Bailey v. Edwards, 371; State ex rel. Bennetts v. Duncan, 451.

## "Minutes of the court"—(Rev. Codes, sec. 6795.)

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## "Municipal"—

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- "Municipal corporation"—  
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- "Quasi-judicial functions"—  
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- "Railroad" and "railway"—(Rev. Codes, sec. 3259.)  
*Helena L. & Ry. Co. v. City of Helena*, 33 *et seq.*
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- "Special" law—  
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- "To read as follows"—Amended statute—  
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- "Undue influence"—  
*Murphy v. Nett*, 51.
- "Willful desertion"—(Rev. Codes, sec. 3646.)  
*Farwell v. Farwell*, 581.
- "Willful neglect"—(Rev. Codes, sec. 3654.)  
*Farwell v. Farwell*, 580.
- "Without contributory negligence on his part"—(Rev. Codes, sec. 5248.)  
*Melzner, Admr., v. Raven Copper Co.*, 357.
- "Working place" of coal miner—(Laws 1911, Chap. 120, sec. 83.)  
*Kallio v. Northwestern Imp. Co.*, 321, 322.
- "Wrongful act or neglect of another"—(Rev. Codes, sec. 6486.)  
*Melville v. Butte-Balaklava Copper Co.*, 8 *et seq.*

## WRITS.

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